Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DENNY'S, INC.,
Petitioner,
v.
RONALD K. THOMAS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, during the *prima facie* stage of a failure to promote case, Plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

2. Whether a mixed motive instruction must be given in a failure to promote case when requested by the Plaintiff, even though the Defendant did not request the instruction, the only defense offered for not promoting Plaintiff was his lack of qualifications, and no direct evidence was presented that the decisionmakers placed substantial negative reliance on an illegitimate criterion.

PARTIES TO THE PROCEEDINGS

Respondent, Ronald K. Thomas ("Thomas") instituted this action in the United States District Court for the Northern District of Oklahoma against Petitioner, Denny's, Inc. ("Denny's").

The parent company of Denny's is Flagstar Companies, Inc. There are no nonwholly owned subsidiaries.

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REFERENCE TO OPINIONS RENDERED BY COURTS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 111 F.3d 1506 (10th Cir. 1997). A copy of that opinion is reprinted at Pages A-3 through A-18 of the Appendix to this petition. It reverses the judgments and findings of the United States District Court for the Northern District of Oklahoma in Case No. 91-C-715-C in favor of Denny's. Copies of the District Court's judgments and findings are reprinted at Pages A-19 to A-29 of the Appendix to this petition.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 25, 1997. On May 24, 1997, Denny's timely filed a Petition for Rehearing. The Tenth Circuit entered an Order denying the Petition for Rehearing on September 2, 1997, which is reprinted at Pages A-53 and A-54 of the Appendix to this petition. This Petition for Writ of Certiorari is filed within thirty days of that date. The jurisdiction of this Court to review the judgment on Petition for Writ of Certiorari rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Respondent ("Thomas") filed this action against Petitioner ("Denny's") seeking damages for racial discrimination and retaliation

in violation of the Civil Rights Act, 42 U.S.C. § 1981 and 42 U.S.C. § 1981(a), and pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq*. Thomas alleged that Denny's failed to promote him to a position of manager and/or assistant manager because of his race and/or because Thomas had complained of racial discrimination to the EEOC. Thomas alleged that such discriminatory and retaliatory failures to promote commenced in 1984 and continued through the time Thomas left Denny's in early 1993. Thomas also alleged claims for intentional infliction of emotional distress and constructive discharge. At the conclusion of Thomas' case in chief, Denny's moved for judgment as a matter of law on all of Thomas' claims. The trial court granted the motion as to Thomas' claims for intentional infliction of emotional distress and constructive discharge.

After conclusion of the trial, the jury rendered a unanimous verdict in favor of Denny's on Thomas' claims for failure to promote based on race discrimination (Appendix F) and retaliation by failure to promote (Appendix G). On both claims, the jury concluded that Thomas had failed to establish a *prima facie* case. The district court also found in favor of Denny's on Thomas' non-jury claims of failure to promote based on race discrimination and retaliation for filing a charge of race discrimination in violation of the Civil Rights Act of 1964, U.S.C. §§ 2000e, *et seq.*, to the extent that they were not disposed of by the jury's verdict on the Section 1981 claims. (Appendix B and C).

On appeal, the Tenth Circuit ruled that two of the trial court's jury instructions were erroneous. Petitioner requests that this Court review the published opinion of the Tenth Circuit Court of Appeals because the decision raises two issues of error which are in conflict with decisions of this Court and other circuit courts. Specifically, the Tenth Circuit ruled that in a failure to promote case, the plaintiff did not have to show during the *prima facie* stage of his case that he at least had the same objective qualifications for the job as the person hired. The Tenth Circuit also ruled that a trial court must give a mixed motive instruction when requested by the plaintiff, even though no such instruction was requested by Denny's, the only defense offered for not promoting Thomas into management was his lack of qualifications, and no direct evidence was presented that the decisionmakers placed substantial negative reliance on an illegitimate criterion.

SUMMARY OF FACTS

From 1978 through February 1993, Thomas, an African American, was employed by Denny's as a cook in Tulsa, Oklahoma. Thomas was liked by his co-workers and no negative comments were made about Thomas. During his employment with Denny's, Thomas also worked part-time as a cook for his father who owns "The Burger," which sometimes caused a scheduling conflict with Denny's. The territorial district of Denny's which is referred to as the Tulsa district included stores in Missouri, *i.e.*, Joplin and Springfield. Denny's four Tulsa restaurants are at the following locations: Unit #247 located on Sheridan Avenue and I-244, Unit #1310 located on 71st Street and Memorial Avenue, Unit #196 located on 48th Street and Yale Avenue, and Unit #482 located on 11th Street and Garnett Road. Thomas was assigned to work at Unit #247 and later transferred to Unit #1310. Thomas occasionally worked at Units #196 and #482. During 1980 through 1981, Denny's had two African American managers on its Tulsa management staff. Cajetan Dikeh was Assistant Manager at Unit #247 and Unit #482. Kenneth Cooper was a General Manager at Unit #196.

For every district, the District Leader (also known as the District Manager) is the only person authorized to make personnel decisions regarding hiring, promotions and transfers within the district. General Managers, Unit Managers, Assistant Managers, Unit Aides (a/k/a Service Coordinators) and Managers-in-Training do not have any authority to make such personnel decisions. However, when the District Leader asked for candidates, the General Manager of a restaurant can only recommend to the District Leader that a unit employee be considered as a potential candidate for management.

During 1978 through 1985, Denny's Oklahoma restaurants were included in Region 10, with the operations office located in Kansas City. During 1985, Denny's reorganized its regional offices and transferred the Oklahoma district to Region 11, with the operations office located in Denver, Colorado. Region 11 utilized the Preparatory Management Program ("PMP") for the purpose of helping to assist unit employees make the transition into management. The PMP is a self-initiative program with hypothetical problems that a candidate completes on his own.

In September 1983, Michael Kearney ("Kearney") was transferred to Tulsa as the District Leader and met Thomas within his

first week in Tulsa. Kearney discussed Thomas with Joe M. Smith ("Smith"), who transferred to Unit #247 as General Manager in September, 1984. Smith told Kearney that Thomas was interested in getting into management. Thomas testified that he did not believe he was discriminated against because of race in 1984. In March 1985, Smith was present during Thomas' interview with Kearney, which by Smith's observation, did not go well, *i.e.*, Thomas avoided any eye contact with Kearney, and Thomas' answers were incomplete and indicated his lack of scope, comprehension and insight into a manager's responsibilities. As a result of the interview, Kearney formed the opinion that Thomas did not have much understanding about the task of a manager and the challenges of the job. Kearney decided not to put Thomas into management. Collectively, the management team determined that it would be to Thomas' benefit and development to participate in the PMP. On or about September 17, 1985, a PMP packet was sent to the store for Thomas. Thomas testified that he received it on November 13, 1985. Thomas admitted he did not understand the PMP packet, and needed help to complete the assignments.

Richard Clemons ("Clemons"), Assistant Manager at Unit #247, was asked to work with Thomas on completing the PMP packet. Clemons set a goal to have Thomas complete the PMP by April 1986. Clemons explained to Thomas that it was Thomas' responsibility to take the initiative to start working on the materials in the packet and that success in the self-initiative PMP was entirely up to Thomas. Clemons set up meetings to go over the progress Thomas was making in the program but Thomas failed to attend some of the meetings. Denny's operates 24 hours a day, seven days a week. Some meetings were scheduled for early in the morning as a result of their work schedules. Kearney followed Thomas' progress with the PMP through conversations with Smith and Clemons. Thomas failed to complete the requirements of the program and failed to start assignments or complete case studies. Because of Thomas' lack of initiative, interest and failure to start or complete specific assignments and goals set for him, the management team decided that Thomas would no longer participate in the PMP until he demonstrated a sincere commitment to participate in and complete the PMP. Thomas never made this commitment and he never completed the PMP. In fact, Thomas conceded at trial that he had the PMP packet in his possession (at home) from 1985 through 1993 but never completed the program. A copy of Thomas' incomplete packet appears at Pages A-121 to A-163 of the Appendix.

In 1986, the only manager hired by Kearney while he was a District Leader in Tulsa was Chauncy Tipton, an African American hired from outside the company. Tipton was chosen over 10 to 12 other candidates. Alonzo Batson and Danny Jackson were two other African American managers who worked in Tulsa during Thomas' employment with Denny's.

On September 25, 1986, Thomas filed a discrimination complaint with the Oklahoma Human Rights Commission ("OHRC") alleging failure to promote based on his race, because Gladys Harris was assigned to the position of Unit Aide rather than Thomas. Thomas never complained of any discrimination prior to that time. The Unit Aide position is not a management position, but a position held by a trusted employee used to watch the restaurant when the manager is not present. There is no selection process for the Unit Aide position and the General Manager selects the employee for this position. The Unit Aide basically "baby-sits" the restaurant and has no authority to make any decisions. During 1985 through 1986, Thomas never told any of his managers that he was interested in becoming a Unit Aide. Thomas testified that he first became aware of the Unit Aide position in June 1986 when Gladys Harris, a waitress at Unit #247, was assigned Unit Aide responsibilities rather than Thomas. However, Harris was also a certified trainer and had been active in training and coaching new and existing employees. Nevertheless, in February 1987, Thomas got the opportunity to perform Unit Aide duties.

Deborah Reynolds ("Reynolds") was transferred to Tulsa as District Leader in 1986. After learning of Thomas' interest in a management position, Reynolds interviewed Thomas in December 1986. After interviewing Thomas, Reynolds, like Kearney and Smith, concluded that Thomas did not have an understanding of how to drive sales or develop employees. His communication skills were weak, he had a hard time communicating his thoughts, he had little knowledge of the restaurant industry and he lacked the necessary business knowledge to be a manager at that time. For example, Thomas was unable to even describe to Reynolds the meaning of "profit."

Reynolds asked Ken Agorichas ("Agorichas"), the Human Resources Manager, to interview Thomas to ensure she was not "missing something." The purpose of the interview was to assess whether Thomas would be a candidate for the management training

program. Agorichas concluded that Thomas had not demonstrated the skills and knowledge to be placed in the management program. Reynolds sent Thomas a memo in August 1987, listing suggestions to help him pursue a management position. She also suggested that he enroll in a college business course, but he did not. Reynolds discussed Thomas with Jamie Cullinan ("Cullinan"), another General Manager, and asked Cullinan to work with Thomas to develop his interviewing skills. Thomas failed to make all the appointments and failed to do the work. Thomas was frustrated because he could not answer the proposed questions. He did not communicate well, mumbled and lacked knowledge of the restaurant industry. After working with Thomas over a seven-month period, Cullinan determined that Thomas had made little improvement and needed to continue to develop his skills. In fact, Cullinan testified that on a scale of 1 to 10, Thomas had only progressed to a 3. Reynolds, Agorichas and Cullinan discussed Thomas and concluded that Thomas needed additional training. Reynolds decided Thomas was not qualified to be promoted to the management program at that time. Reynolds later promoted Diana Newhouse, a college graduate who completed the unit promotable program packet.

In 1987, Irene Johnson ("Johnson"), former General Manager over Unit #482, used Thomas on two occasions (two shifts) as a Unit Aide. Reynolds asked Johnson and Chauncy Tipton, an African American manager, to interview Thomas to assess his strengths and weaknesses. Johnson concluded that Thomas needed to find out more about management. He was unsure of himself in the administrative department due to his lack of knowledge. Johnson suggested that Thomas enroll in college business courses to overcome his weaknesses and get additional training by doing Unit Aide work in order to get into management. However, Thomas did not enroll in any courses. Other than this contact with Thomas, Johnson was never in an official position to recommend Thomas for management; however, she would bring up Thomas' name for consideration.

Johnson conceded that she liked Thomas, that he confided in her, and he was one of her favorite employees. He never told her that he felt he was being discriminated against because of his race. She never heard anyone say anything negative or derogatory about Thomas. She spent extra time with her favorite employees outside of work and was counseled for getting too close to her subordinates and letting it affect her decision-making. Johnson was never in a position to promote anyone. She admitted that she enrolled in college courses

to help her understand management. She conceded at trial that she did not know other members of management had tried to work with Thomas to help him get into management. Johnson further testified that Thomas' race was not an issue with Denny's.

During May 1988, Reynolds promoted Shoiab Ahmed ("Ahmed") into the management program. Ahmed was a unit employee who had enrolled in college courses to develop a better understanding of management skills. He previously completed the UPP. On August 29, 1988, Reynolds hired Danny Jackson ("Jackson"), an African American.

Herbert Rapier ("Rapier") transferred to Tulsa in 1988 as the new District Leader. After completing the management program, Jackson was promoted to Assistant Manager by Rapier and transferred to Unit #247. Upon learning of Thomas' interest in management, Rapier met with Thomas to consider Thomas' qualifications for management and to put him into the unit promotable program. Rapier advised Thomas of what was expected of him to be considered for a promotion into management. Rapier transferred Thomas to Unit #1310 to participate in the Model Unit program, which was the "role model" for all other restaurants. Thomas became the "training cook" for the Model Unit. Additionally, Rapier gave Thomas a UPP packet as well as a list of goals and objectives to complete.

In 1988, Masood Kasim ("Kasim"), Assistant Manager at Unit #1310, was assigned to work with Thomas as his supporting manager. Kasim did not know Thomas' educational level and he did not have any hiring authority. Thomas took no action on the goals and objectives given to him by his managers, and he showed little initiative, if any, in completing the UPP packet. Rapier did not promote Thomas due to his lack of initiative and failure to complete the goals and objectives given to him. During 1989, John Lynch ("Lynch") was hired as the General Manager for Unit #1310, but he did not have any authority to promote unit employees or hire outside candidates for the management program. Lynch could only recommend to the District Leader potential candidates for the management program.

During early 1990, Hassib Darweesh ("Darweesh") received training in the Oklahoma City district as a manager. During this time, Darweesh recommended Imogene Warren ("Warren"), an African American working in the Oklahoma City area, for the management

program. Warren started working for Denny's in January 1989, completed the management program and was promoted by her District Leader to Unit Manager in August 1991. During 1990, Darweesh was transferred to Tulsa as the new District Leader and assumed the responsibility for all employees within the Tulsa district. Thomas told Lynch that he had completed the PMP. As a result, Lynch recommended Thomas for management to Darweesh. However, at trial Lynch learned that Thomas had never completed the PMP. After reviewing the little effort Thomas made on the PMP, Lynch testified that he would not have recommended Thomas for management, and felt Thomas misled him. Lynch testified that being a good cook and trainer does not qualify an employee for getting into the management program.

Kasim did not like Darweesh and considered suing Darweesh and Denny's. Darweesh was going to discharge Kasim because Kasim owned and operated a convenience store which conflicted with his employment at Denny's. Subsequently, Kasim resigned his employment. In 1990, Darweesh interviewed John Meaux ("Meaux"), an African American, for the MIT program. In September 1991, Darweesh once again interviewed Meaux and extended him an offer of employment for management. However, due to a conflict with his college schedule, Meaux declined Darweesh's offer of employment.

On September 12, 1991, Thomas filed the instant lawsuit alleging that he was denied a promotion with Denny's because of his race, African American, in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. Thomas further alleged claims for breach of contract, intentional infliction of emotional distress, constructive discharge, retaliation and civil conspiracy. Thomas considered leaving Denny's in June 1992. Thomas' civil conspiracy claim and breach of contract claims were dismissed by the district court upon Denny's motion.

In 1991, Jeff Bell ("Bell") became a manager and worked in the same store as Thomas. He testified that he never saw Thomas show the initiative to become a manager. Bell had attempted to become a manager for ten years. However, he completed the PMP and completed a two-year food service management program at Vo-Tech.

John Lynch ("Lynch") resigned his employment with Denny's in October 1992. Lynch testified at trial that he never saw Rapier or

Darweesh act or display prejudice or discrimination toward any employees, including Thomas. In 1992, Darweesh selected Thomas as Employee of the Year based on his performance within his job code. The award is presented annually to a Unit Level employee and is not characteristic of anything in the management ranks. Thomas also continued to receive pay increases throughout his employment.

Darweesh and Tom Taylor ("Taylor"), the District Human Resources Representative, interviewed Thomas on November 3, 1992 to evaluate his background and qualification for management. Thomas' answers were short with weak or perhaps no responses. Thomas lacked knowledge of the restaurant business and had difficulty in taking the initiative and motivating and instructing others. After this meeting, Darweesh and Taylor discussed Thomas' potential for a management position and decided to provide feedback to Thomas on how he could perhaps improve in areas where he had shown weakness as well as suggesting things that Thomas could do to help himself obtain a management position. On December 27, 1992, Darweesh and Scott Vanarsdel, General Manager for Unit #1310, met with Thomas to discuss the results of the meeting Thomas had with Darweesh and Taylor for the purpose of offering Thomas feedback, suggestions, and a position in management. Thomas demanded that Darweesh give him a written guarantee that he would be placed in management. Thomas became very hostile, cursed and called Darweesh a liar, told Darweesh he did not believe him, and left the meeting. After Thomas failed to act upon any of their suggestions Darweesh made the decision not to promote Thomas into the management program. Darweesh did not use a negative term in discussing Thomas with Rapier, Lynch or anyone.

On February 13, 1993, Thomas resigned his employment with Denny's after his attorneys drafted his letter of resignation. Subsequently, he worked at "The Burger" and as a forklift driver through Talent Tree Personnel.

In May 1993, Darweesh interviewed and hired Henry Thomas, an African American, for the management program. After Henry Thomas completed the program, Darweesh promoted him to Assistant Manager and transferred him to Unit #1310. David Booker ("Booker"), an African American, started working for Denny's in 1976 in Texas, and worked his way through college as an employee of Denny's. Booker was promoted to Regional Leader for Denny's Region 104 and reported to Dennis Ekstrom, the Director of

Operations for Denny's, which includes the Tulsa district. Booker currently owns and operates a Denny's franchise restaurant located in Beaumont, Texas. He testified that Agorichas and Taylor had been supportive of his efforts for advancement at Denny's.

In October 1993, Thomas' attorneys hired two eighth grade English teachers employed by Monte Cassino Middle School (Pat Efird and Mary Strakoulas), to tutor Thomas in grammar lessons in preparation for the trial of this matter. Thomas had a couple of sessions at the Monte Cassino Middle School, but the majority of the sessions were held at Thomas' attorneys' law offices. Mary Strakoulas had at least sixteen (16) tutoring sessions on grammar with Thomas, which were paid for by Thomas' attorneys' law firm.

REASONS FOR GRANTING REVIEW

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS FROM THIS COURT REGARDING PLAINTIFF'S BURDEN OF PROOF AT THE *PRIMA FACIE* STAGE OF A FAILURE TO PROMOTE CASE.

In his Appellate Brief to the Tenth Circuit, Thomas argued that the trial court erred in instructing the jury as to what he needed to prove to establish that he was qualified for a management position. After instructing the jury on the elements of a *prima facie* case for failure to promote, the trial court also gave the following instruction to the jury:

> QUALIFIED APPLICANT - DEFINED
>
> To meet his initial burden, the plaintiff must prove that he was qualified for the position for which he applied. To show that he was qualified, plaintiff must show that he possessed the necessary requirements for the position he sought. You should consider evidence concerning the education, training or experience necessary to perform the job. The plaintiff is not required to prove his qualifications were superior relative to other employees in like positions. The plaintiff must prove, however, that he was at least as well qualified for the position as the person hired instead of him. (Page A-36 of the Appendix).

At trial, Thomas' counsel objected to the above instruction as not being the law. In response to the trial court's question: "What do you say the law is?" Thomas' counsel responded:

MR. BLEDSOE: "The law is based on the Kenworthy case -- I believe the instruction should read as follows: To meet his initial burden, the plaintiff must present some credible evidence that he possessed the objective qualifications for the position or positions for which he applied. This burden is not onerous and may be presented through his own testimony and the testimony of others, even when disputed by the defendant employer."(Page A-51 of the Appendix).

After some discussion on the matter, the trial court asked Thomas' counsel:

THE COURT: "Give me the words you say should be used."

MR. BLEDSOE: "The words are, 'The Plaintiff must present some credible evidence that he possessed the objective qualifications for the position for which he applied.' And then in line with the language of Kenworthy, which perhaps is duplicitous, 'The burden is not onerous and may be presented through his own testimony and the testimony of others' --" (Page A-52 of the Appendix).

The trial court declined to modify its instruction. The jury returned the following verdict:

VERDICT FORM I

Plaintiff's Claim

Failure to Promote Based on Race Discrimination

(Your answers to each of the following questions must be unanimous.)

1. Do you find from the preponderance of the evidence that plaintiff Ronald Thomas has

established each essential element of his *prima facie* case of failure to promote based on race discrimination as defined in these instructions?

_____	X
Yes	No

On appeal, the Tenth Circuit ruled that the trial court's "Qualified Applicant" instruction did not state the applicable law and the trial court's failure to give the instruction requested by Thomas constituted an abuse of discretion. Specifically, the Tenth Circuit concluded that the trial court's instruction did not accurately state Plaintiff's burden at the *prima facie* stage of the case. The panel ruled that according to Kenworthy v. Conoco, Inc., 979 F.2d 1462 (10th Cir. 1992), the employer's subjective business reasons are not properly considered at the *prima facie* stage, and should instead be "considered in addressing whether those articulated reasons are legitimate or merely a pretext for discrimination." Specifically, the Tenth Circuit criticized the last sentence of the trial court's "Qualified Applicant" instruction that provided:

> The Plaintiff must prove, however, that he was as least as well qualified for the position as the person hired instead of him. (Page A-32 of the Appendix).

Denny's respectfully submits that the Tenth Circuit's opinion conflicts with Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); EEOC v. WilTel, Inc., 81 F.3d 1508 (10th Cir. 1996); and Allen v. Denver Public Sch. Bd., 928 F.2d 978 (10th Cir. 1991). Also, the opinion is erroneous and provides preferential treatment to applicants within the protected class. Moreover, the trial court's "qualified applicant" instruction did not direct the jury to consider the employer's subjective business reasons at the *prima facie* stage of the case. In fact, there is absolutely nothing in the record even to suggest that the jury considered subjective job requirements at the *prima facie* stage of the case. Finally, the Tenth Circuit misapplied Kenworthy to the case at bar.

1. The Tenth Circuit's decision conflicts with decisions from this Court and other Tenth Circuit opinions.

Denny's respectfully submits that the Tenth Circuit's opinion is in conflict with language from Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981), where this Court ruled as follows regarding objective qualifications of applicants in a Title VII case:

> [T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. (emphasis added).

Also, in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), this Court set forth the elements of a *prima facie* case of racial discrimination as follows:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (emphasis added).

Further, in EEOC v. WilTel, Inc., 81 F.3d 1508 (10th Cir. 1996) an employee complained that she was not hired for a position because she was an evangelical Christian. The Tenth Circuit ruled that in order to establish a *prima facie* case for failure to promote, an employee must prove the following elements:

> (1) [S]he was a member of a protected class; (2) she applied for and was qualified for an available position; (3) she was rejected despite those specific qualifications; and (4) WilTel hired other persons possessing [plaintiff's] qualifications who were not members of her protected class. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-08, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993); Patterson v. McLean Credit Union, 491 U.S. 164, 186-87, 109 S.Ct. 2363, 2377-78, 105 L.Ed.2d 132 (1989); Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991) (emphasis added).

The Tenth Circuit ruled that the "EEOC failed to demonstrate that [plaintiff] had similar experience and skills to those possessed by the persons who were hired." *Id.* at 1516-17. It was

undisputed that plaintiff did not possess the minimum qualifications of two to four years of customer service/telephone experience, and organizational, communications, and interpersonal skills. The Tenth Circuit concluded that the evidence produced by WilTel demonstrated that the hired applicants who did not have two to four years experience were not "like-qualified," and plaintiff had failed to establish that she was qualified for the position for purposes of establishing a *prima facie* case. *Id.* at 1516.

Also, in Allen v. Denver Public School Board., 928 F.2d 978, 984 (10th Cir. 1991), an employee claimed she failed to receive a promotion to "career" or "college" counselor. The Tenth Circuit ruled:

> In order to establish a *prima facie* case on this issue, Allen must provide some evidence to establish "[s]he was equally or better qualified than those employees actually promoted." Clark v. Atchison, Topeka & Santa Fe Ry. Co., 731 F.2d 698, 701 (10th Cir. 1984).

In that case, the plaintiff presented no evidence regarding the qualifications of the white men who were chosen for the position, but merely testified that she was more qualified. The court concluded that the plaintiff did not present evidence to establish that she was equally or better qualified than those promoted, and thus, failed to establish a *prima facie* Title VII discrimination case.

In the case at bar, the trial court's "qualified applicant" instruction provided that Thomas did not have to prove that his qualifications were superior relative to other employees in like positions, but he only had to demonstrate that he at least had the same objective qualifications for the job as the person hired. The jury instruction is consistent with this Court's holdings in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). However, the opinion of the Tenth Circuit is in conflict with those opinions.

2. The Tenth Circuit's decision provides preferential treatment to applicants in the protected class.

Thomas testified at trial that he was more qualified than all the employees who were promoted during his tenure. (Page A-120 of the Appendix). Denny's submits that decisions regarding promotion were not made on an "*ad hoc* basis" or solely on "the interviewer's subjective evaluations," as indicated in the Tenth Circuit's opinion. Rather, Denny's presented evidence that candidates selected in place of Thomas met the objective and subjective requirements of the job. Examples of some of the objective qualifications of employees promoted in place of Thomas included:

1. Diana Newhouse	Completed college courses; completed UPP. (Pages A-53 and A-54 of the Appendix).
2. Shoaib Ahmed	Completed business courses at Rogers College as recommended by Reynolds; completed UPP; obtained a Marketing (Business) Degree; worked in his father's import/export business. (Pages A-54 through A-56 of the Appendix).
3. Dava Stark	Completed college courses; completed UPP; worked several years with the company. (Page A-57 of the Appendix).
4. Jeff Bell	Completed UPP; started as busboy in 1981 while in high school; completed 2 year Vo-Tech program on restaurant management; took 10 years to get promoted. (Pages A-58 through A-67 of the Appendix).
5. Housam Elsoueissi	Completed UPP and college courses. (Pages A-58 and A-59 of the Appendix).
6. Masood Kasim	Obtained Bachelors and Masters degrees; promoted through ranks in 1984 before UPP started. (Pages A-68 and A-69 of the Appendix).
7. Alvin Clement	Obtained Bachelors Degree; started as dishwasher; worked as cook throughout

college; promoted in 1984 before UPP started. (Page A-70 of the Appendix).

Rather than follow this Court's decision in Texas Dep't of Community Affairs v. Burdine and McDonnell Douglas Corp. v. Green (as well as previous Tenth Circuit decisions), in the case at bar the Tenth Circuit opinion provides preferential treatment to Thomas by suggesting that he did not have to have the same objective qualifications for the job as those hired. The opinion has a "chilling effect" and places companies in a "catch-22" situation. Specifically, if a company hires the best qualified candidate, an applicant in the protected class can sue and establish a *prima facie* case by simply announcing "I'm qualified." Also, companies will be faced with a flood of reverse discrimination lawsuits because the decision encourages the hiring and promotion of less qualified "protected" candidates. In short, the Tenth Circuit's decision forces employers to give applicants in the protected class preferential treatment in hiring and promotion by ruling that applicants in a protected class do not have to have the same objective qualifications as "non-protected" applicants.

Thus, Denny's respectfully requests that this Court grant this Petition For Writ of Certiorari, overrule the Tenth Circuit's opinion and affirm the trial court's judgment.

3. The Tenth Circuit misapplied Kenworthy to the case at bar.

In Kenworthy, the Tenth Circuit ruled that at the *prima facie* stage of the case, only "objective" requirements of the job should be considered. In the case at bar, the trial court instructed the jury to only consider evidence regarding "education, training or experience necessary to perform the job" at the *prima facie* stage in determining whether Thomas was qualified. "Education, training or experience" are objective job requirements. In its opinion, the Tenth Circuit suggests that the trial court and jury considered "subjective" job requirements at the *prima facie* stage of the case when they found that Thomas did not establish a *prima facie* case of discrimination. However, there is absolutely nothing in the instructions or record to support such a conclusion. The Tenth Circuit's opinion focuses on the fact that Denny's maintained that Thomas did not meet the "subjective" job requirements (*e.g.*, interviewing, communications, lack of initiative). However, the Tenth Circuit's opinion fails to

recognize that Denny's presented evidence and also maintained that Thomas did not meet the "objective" job requirements (*e.g.*,completion of the PMP, completion of college business courses, completion of various work assignments, goals and objectives). The jury and trial court apparently agreed and determined that Thomas did not even establish a *prima facie* case of failure to promote based on race.

4. The Kenworthy language requested by Thomas was redundant.

Finally, Denny's respectfully submits that the Kenworthy language requested by Thomas' counsel was redundant and not needed. Specifically, Thomas' counsel wanted the trial court to instruct the jury that Thomas could establish he was qualified for promotion through his own testimony and the testimony of others. However, Denny's respectfully submits that evidence is always presented at trial through the testimony of the plaintiff and other witnesses. Also, the Court's other instructions informed the jury regarding the proper use of evidence. For example, in discussing the burden of proof, the trial court explained:

> In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. (Page A-27 of the Appendix).

The trial court also instructed the jury as follows:

> CREDIBILITY OF WITNESSES
>
> Now in saying that you must consider all the evidence does not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable

than the testimony of a larger number of witnesses to the contrary. (Page A-39 of the Appendix).

In deciding whether you believe any witness you should ask yourself a few questions: did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence? (Page A-39 -40 of the Appendix.).

Denny's submits that the Tenth Circuit's ruling implies that Thomas presented credible testimony at trial that he was qualified for promotion through his testimony and the testimony of former managers which required a reversal of the jury verdict and trial court's ruling. However, the trier of the facts apparently determined that Thomas and his witnesses were not credible, and found that Thomas did not even establish a *prima facie* case. Accordingly, Denny's respectfully requests that this Court grant this Petition For Writ of Certiorari.

II. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING WHEN A MIXED MOTIVE INSTRUCTION MUST BE GIVEN IN A CASE.

In the case at bar, the Tenth Circuit relied on Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171, 181 (2d Cir. 1992), and ruled that the trial court should have given a mixed motive instruction in this case as requested by Thomas with respect to his claim that he was denied promotions in retaliation for filing a discrimination complaint.

In Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), this Court dealt with a mixed motive case, in which the plaintiff offered evidence, credited by the district court as fact finder, that a forbidden reason played a motivating role in the adverse employment decision. This Court held that if the plaintiff in a Title VII suit can establish that a prohibited

discriminatory factor played a "motivating part" in the challenged employment decision, the defendant, in order to avoid liability, has the burden of proving "by a preponderance of the evidence that it would have made the same decision" even if it had not taken the discriminatory factor into account. *Id.* at 258. This Court made clear that the burden shifting threshold a plaintiff must cross is proof that the forbidden animus was at least one of the "motivating" factors in the employment decision. *Id.* at 247. This Court noted that the issue does not arise for the trier of fact until the plaintiff has carried the burden of persuading the trier that the forbidden animus was a motivating factor in the employment decision but has failed to persuade the trier that non-discriminatory reasons proffered by the employer were pretext and not also motivating factor. A plaintiff will be entitled to a burden shifting instruction on the Price Waterhouse defense where the evidence is sufficient to allow a trier to find both forbidden and permissible motives. However, not all evidence that is probative of discrimination will entitle the plaintiff to a Price Waterhouse charge. *Id.*

In Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995), the Fourth Circuit ruled that to earn a mixed motive instruction a plaintiff must present "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion" (quoting Price Waterhouse, 490 U.S. at 277). What is required is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." 67 F.3d at 1142. The Fourth Circuit ruled that whether a plaintiff has satisfied this evidentiary threshold is a decision for the district court after it has reviewed the evidence. *Id.* If, as in the case at bar, the plaintiff failed to meet this threshold, then the plaintiff must proceed under the standards that apply in pretext cases. *Id.* at 1143.

As noted by the Third Circuit in Walden v. Georgia-Pacific Corp., 1997 WL 584552 (3d Cir. Sept. 23, 1997):

> . . . [A] plaintiff must clear a high hurdle to qualify for a mixed motives instruction: "The burden of persuasion shifts to the employer 'only after the plaintiff ha[s] proven that her employer acted unlawfully,' and not merely 'on the basis of a *prima facie* showing.'" (quoting Binder v. Long Island Lighting Co., 933 F.2d 187, 192 n.1 (2d Cir. 1991)). Put differently, a mixed motives instruction is warranted only

> when the "evidence is sufficient to permit the factfinder to infer that [a discriminatory] attitude was more likely than not a motivating factor in the employment decision." Griffiths, 988 F.2d at 470.
>
> Justice O'Connor shed light on what constitutes such "direct" evidence as follows: [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiffs' burden in this regard.

In the case at bar, at no time during the course of trial did Denny's claim that even if race or retaliation were a motivating factor in its decision, that it, nevertheless, would have refused to promote Thomas into management. The sole defense relied upon by Denny's was that Thomas was not qualified for promotion into management. Nevertheless, the Tenth Circuit relied upon the following testimony by Johnson and Kasim in reaching its decision:

> (a) Johnson testified she mentioned Thomas' name to Ken Agorichas, Human Resources Department, when he was conducting management interviews and Agorichas stated, "You know Thomas has a suit against us."(Page A-71 of the Appendix). Denied at trial by Agorichas.(Page A-72 of the Appendix).
>
> (b) Johnson testified she mentioned Thomas' name to Reynolds in 1986, and Reynolds said: "We have a problem with Ronnie Thomas and his suit against Denny's." (Page A-73 of the Appendix). Denied at trial by Reynolds. (Page A-74 of the Appendix).
>
> (c) Johnson testified that she mentioned Thomas' name to Rapier as a management candidate and Rapier responded: "They will never allow Ronnie to become manager." (Page A-75 of the Appendix). When asked "why" at trial by Thomas' attorney, Johnson responded, "Because he has a suit against Denny's." (Page A-75 of the Appendix).

> However, the record is unclear as to whether she was quoting Rapier or if Johnson was stating her opinion. Nevertheless, Rapier denied making such statements. (Page A-76 of the Appendix).
>
> (d) Kasim testified that in 1991 he asked Darweesh why he did not promote Thomas (in the presence of Housam Elsoueissi) and Darweesh answered "[W]ould you promote someone who has sued?" (Pages A-77 and A-78 of the Appendix). However, Darweesh denied making the statement (Page A-79 of the Appendix), and Elsoueissi testified he never heard Darweesh make the statement. (Page A-80 of the Appendix).

However, no testimony was presented that anyone in upper management actually stated: "Thomas will not be promoted because he filed a discrimination complaint." Further, Agorichas, Reynolds, Rapier and Darweesh testified that Thomas' lawsuit or discrimination complaints were not factors in their decisions not to promote him. Thomas simply was not qualified. Moreover, in EEOC v. WilTel, Inc., 81 F.3d 1508 (10th Cir. 1996), the Tenth Circuit explained:

> In contrast, we have held that statements which are merely expressions of personal opinion or bias do not constitute direct evidence of discrimination. [Heim v. State of Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993)] (manager's remark that "I hate having fucking women in the office" was not direct evidence of discriminatory intent); [Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990), cert. denied, 506 U.S. 907 (1992)] (director's "feelings about women being better suited to some jobs than others" was not direct evidence of discriminatory intent); Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1547, 1549 (10th Cir. 1987) (managers' statement that a plaintiff could not be promoted because "he was too damned old," and that other plaintiffs were too old to learn new technologies necessary to promotion and too old to be in supervisory or management positions was not direct evidence of discriminatory intent), reh'g denied, 842 F.2d 253 (1988). *Id.* at 1514.

Here, the trial evidence was insufficient to support the inclusion of a "mixed motive" instruction. In fact, the jury and the trial court ruled that Thomas did not even establish a *prima facie* case

trial court ruled that Thomas did not even establish a *prima facie* case of race discrimination or retaliation. Moreover, the Tenth Circuit's opinion also conflicts with Mooney v. Aramco Servs. Co., 54 F.3d 1207 (5th Cir. 1995). In Mooney, 54 F.3d at 1218, 1219 the Fifth Circuit ruled as follows regarding when a mixed motive instruction should be given:

> "[t]o shift the burden on the employer to show by a preponderance of the evidence that it would have made the same decision even without the forbidden factor, the employee must show that 'the employer *actually relied on* [the forbidden factor] in making its decision." Langley v. Jackson State University, 14 F.3d 1070, 1075 (5th Cir. 1994) (emphasis in original).
>
> Although the statement allegedly made to Thim[1/] and the statement allegedly overheard by Mooney[2/] create inferences that age played a part in their terminations, when taken in their entirety, both statements are primarily indicative of a desire to save money by employing persons at lower pay. The statements to Olson[3/] and Williams[4/] merely constitute a

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1/ According to Thim, his supervisor stated, "If I can replace an expensive American expat with a younger and cheaper Brit, I can save the company a lot of money."

2/ Mooney testified in part,

"Well, as I recall, Dan Lawlor, who was a younger engineer, was afraid that he might be surplussed. So, he was talking to Dan Christy about this and Dan told him that, 'Don't worry. They're going to get rid of the older employees with the higher salaries.'"

3/ Olson testified in part,

"Q. Did you ask Mr. Combs at your January, 1985, meeting why you were being fired?
A. Yes.
Q. What did he tell you?
A. He said it couldn't be because of my performance because that's been excellent. 'So it must be your age.'"

4/ Williams testified in part,

"Q. Did you overhear Mr. Churchville make any other comments about your termination at a later date?

> speculation as to possible discrimination in the termination of Trial Plaintiffs. There is no evidence that Appellee "actually relied on" Trial Plaintiff's age in making the decision. While we could *infer* such a conclusion from these statements, we cannot say that they provide *"direct evidence"* of age related animus.

In footnote 17, the Fifth Circuit went on to rule as follows:

> Finally, "even if the jury instructions were erroneous, we will not reverse if we determine, based on the entire record, that the challenged instruction could not have affected the outcome of the case." FDIC v. Mijalis, 15 F.3d 1314, 1318 (5th Cir. 1994). Trial Appellants have failed to satisfy this burden. The jury plainly did not believe their testimony under the lower "inferential evidence" standard employed in the McDonnell Douglas analysis. Consequently, a reasonable jury could not have found that the evidence presented constituted the higher level of "direct evidence" necessary to shift the burden of persuasion to the defendant.

In the case at bar, the trial court, after reviewing the evidence, determined that Thomas failed to meet the threshold required for a mixed motive instruction. Also, the jury determined that Thomas did not even establish a *prima facie* case of retaliation under the lower "inferential evidence" standard employed in the McDonnell Douglas analysis. In short, Denny's respectfully submits that the Tenth Circuit's opinion is in conflict with Mooney v. Aramco Servs. Co., Price Waterhouse v. Hopkins, Fuller v. Phipps, Walden v. Georgia-Pacific Corp., and the case law cited below. Thus, this Court should grant this Petition for Writ of Certiorari, overrule the Tenth Circuit's opinion and affirm the trial court's decision.

See also Considine v. Newspaper Agency Corp., 43 F.3d 1349 (10th Cir. 1994) (NAC did not invoke the "mixed motive defense" and instead argued that age was simply not a factor in its hiring decisions); Hook v. Ernst & Young, 28 F.3d 366 (3d Cir. 1994) (mixed motive instruction not warranted); Hargett v. Nat'l

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A. Yes. Within a week after I had been given my formal letter I was sitting at my desk and . . . I overheard Pat talking to the other person and saying, 'Williams has a good case against Aramco for age discrimination.'"

Westminster Bank, 78 F.3d 836 (2d Cir. 1966), cert. denied, 519 U.S. ___, 117 S. Ct. 84, 136 L. Ed. 2d 41 (1996) (same); Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) (same).

III. THE COURT OF APPEALS' DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Denny's respectfully submits that the Tenth Circuit's opinion fails to include relevant facts that were presented at trial that significantly impact the issues addressed in its opinion. Specifically, in its opinion, the Tenth Circuit states that "the promotion procedure at Denny's was not particularly structured." However, the statement is not supported by the record. Denny's requested that employees seeking promotion: (1) complete the unit promotable program packet; (2) complete college courses; (3) perform unit aide work; (4) interview for the position; (5) communicate effectively; and (6) demonstrate knowledge of the restaurant industry. However, Thomas did not comply with Denny's requests. He had a high school education and worked at Denny's as a cook since high school. He was given a unit promotable packet to complete as early as 1985. (Page A-81 of the Appendix). This self-initiative packet contained case studies, hypotheticals and tasks to educate and develop employees who did not have management skills and experience, or an understanding of business operations.[2/] Thomas conceded that he never completed the packet. (Pages A-82 and A-83 of the Appendix). However, testimony was presented at trial that Thomas told members of management that he had completed the packet. Also, although Denny's requested that Thomas take college courses to increase his knowledge of business operations, he did not. Failing to comply with these objective requirements, Thomas did not have an understanding of the restaurant business, could not answer questions regarding the business when he was interviewed, and had poor communication

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2/ A copy of Thomas' incomplete packet that he had in his possession since 1985 is contained at Pages A-121 through A-163 of the Appendix.

skills.[6/] He did perform some unit aide work.[7/] Those employees who were promoted in place of Thomas complied with the company's requests to become promotable candidates.

Additionally, in its opinion, the Tenth Circuit states that "in each instance in which Mr. Thomas was not promoted, the position was filled with a non-African American." However, the record reflects that during Mr. Thomas' tenure at Denny's, other African Americans were placed or offered employment into management in Oklahoma, including the following:

1973-83	Alonzo Batson	1991	Imogene Warren [8/]
1980	Catejan Dikeh		Andy Goodwin
1980	Kenneth Cooper	1992	John Meaux[9/]
1986	Chauncy Tipton	1993	Henry Thomas
1988	Dana Jackson		

(Pages A-88 through A-96 of the Appendix).

In fact, Warren, Goodwin, Henry Thomas and Meaux were hired, recommended for promotion, or offered a management position by Darweesh, a District Leader, who Thomas alleged did not recommend him for promotion because of his race.

6/ Kearney, Rapier and Darweesh testified that they also provided Thomas with specific assignments to aid him in becoming promotable, but he failed or refused to complete the tasks. (Pages A-84 through A-86 of the Appendix).

7/ In footnote 3 of its opinion, the Court states that a " unit aide runs the restaurant in the absence of a manager or assistant manager." The opinion implies that a person performing the duties of a unit aide is actually performing the same duties as an assistant manager or a manager which is inaccurate. Rather, a unit aide is a trusted employee who "babysits" or carries the keys to the restaurant for a few hours at a time, generally when business is very slow. They follow managers' directives and do not make business decisions and do not independently determine what is gong to happen in the restaurant. (Page A-87 of the Appendix).

8/ Warren and Goodwin worked in Oklahoma City. The remaining listed employees were hired in Tulsa restaurants where Thomas worked.

9/ Meaux declined an offer by Darweesh to be placed in Denny's management in order to pursue his college education.

In its opinion, the Tenth Circuit states that Thomas presented testimony of Irene Johnson and Masood Kasim, former general managers, that they believed Thomas was qualified for promotion into management. However, the Tenth Circuit's opinion does not state additional testimony that was introduced at trial regarding Johnson and Kasim that was relevant to the issue of Thomas' qualifications. First, as managers,[10/] Johnson and Kasim simply recommended employees to be considered for management. The district leader determined who would be promoted. Johnson and Kasim did not participate in the actual selections and promotion process. Further, Johnson testified that she used Thomas as a unit aide in the summer of 1987, that Thomas needed to learn more about what a manager does; that he needed to read some books or take a college course on management; that Thomas was concerned about his lack of knowledge of the administrative work required to be a manager; that Thomas did not complete the assignments in the Unit Promotable Packet; that Thomas worked at a different restaurant than Johnson, and she did not work closely with him. (Pages A-97 through A--99 of the Appendix). Johnson conceded that she did not find out until trial that Rapier, a District Leader, and Smith, a manager, had tried to work with Thomas to become promotable and had given Thomas a UPP packet and goals to complete, but he did neither. She also conceded that if she had that information, her opinion as to whether Thomas should be in management may change. (Pages A-100 through A-102 of the Appendix).

Also, no evidence was presented that Kasim knew Thomas had failed to comply with management requests to complete the UPP, failed to take college business courses, made misrepresentations to management that he had completed the UPP, and knew of upper management's efforts to assist Thomas in becoming promotable. The overwhelming trial evidence simply did not support Kasim's and Johnson's testimony regarding Thomas' abilities or credibility.

In its opinion, the Tenth Circuit notes that evidence was presented that Smith, a former manager, stated during a Human Rights investigation that Thomas was "at least as promotable as candidates hired off the street into the management training program." However, the Tenth Circuit's opinion fails to include the following statements

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10/ In fact, several managers throughout the District recommended their favorite employees for promotion.

by Smith regarding Thomas' abilities: Thomas did not interview well but kept looking at his hands and at the floor while answering questions, his answers to questions indicated his lack of scope on what a manager's responsibilities included, Thomas showed no interest in starting the UPP packet, Thomas consistently failed to complete assignments, Thomas failed to show up for meetings, and Thomas lacked the initiative and cooperation to complete the UPP packet. (Page A-103 of the Appendix). Smith also testified that he had no evidence that Thomas was denied a promotion because of his race. (Pages A-104 through A-108 of the Appendix).

At footnote 4 of its opinion, the Tenth Circuit cites a statement by Thomas that meetings to assist him with the UPP were set by assistant manager, Dick Clemmons, at 2:00 a.m. in 1985 or after Thomas' shift. However, Denny's operates 24 hours a day, and because the Court's opinion does not state what shift Thomas worked in 1985, the footnote implies that Denny's purposely scheduled these appointments at inconvenient hours, which is not supported by the record.

The Tenth Circuit's opinion also fails to mention the following relevant evidence: during Reynolds' tenure as District Leader, Cullinan, a manager, assisted Thomas with his communication and interviewing skills through mock interviews in an attempt to help him become promotable. However, Cullinan testified that after working with Thomas, he demonstrated little knowledge of the restaurant industry, Thomas mumbled, and had no knowledge on how to enhance employees' performance. Cullinan had to assist Thomas to reanswer 75% of the questions, and, in Cullinan's opinion, on a scale of 1-10, Thomas' improvement level was only a 3 after Cullinan had worked with Thomas. Cullinan testified that Thomas was not qualified for promotion. (Pages A-109 through A-113 of the Appendix). Also, Lynch, a former manager, testified at trial that he recommended Thomas for promotion because Thomas had told Lynch that he had completed the UPP. At trial, Lynch learned for the first time that Thomas had not completed the UPP. He testified that he would not have recommended Thomas for a promotion into management if he had known Thomas had not completed the UPP, and after learning at trial that Thomas had misled him. (Pages A-114 through A-116 of the Appendix). Also, when Thomas was interviewed by Darweesh in 1992, Thomas became hostile and cursed Darweesh. (Pages A-117 and A-118 of the Appendix). Finally, Thomas conceded at trial that after his resignation, and shortly before

trial, his attorneys arranged for him to be tutored by an 8th grade English teacher. These lessons were held at Thomas' attorneys' law offices and paid for by Thomas' attorneys. (Page A-119 of the Appendix). An impression was left with the jury that Thomas was trying to improve his communication skills before trial in an effort to dispute Denny's claim that he had poor communication skills.

In his Appellate Reply Brief, Thomas argued that the trial court erred in including the following sentence in the instruction defining "Qualified Applicant:" The Plaintiff must prove, however, that he was at least as qualified for the position as the person hired instead of him. In footnote 5 of its opinion, the Tenth Circuit states that "Denny's suggested for the first time at oral argument, that Mr. Thomas did not adequately inform the trial court of his objection to this instruction in light of Kenworthy." That is a misstatement of the facts, which omits that Thomas never complained on appeal about the last sentence of the instruction until his Reply brief. This effectively precluded Denny's from having the opportunity to present argument on this particular issue prior to oral argument. The Tenth Circuit's published opinion implies otherwise.

Also, during oral argument, the Tenth Circuit asked Denny's counsel if Thomas' counsel specifically objected to the last sentence of the Court's instruction. Counsel for Denny's directed the panel to the record and read the statements Thomas' counsel made to the trial court regarding the "Qualified Applicant" instruction, none of which focused at all on the last sentence. The Tenth Circuit has ruled that in order to preserve an issue for appeal, the objection at trial must be timely, clear and specific. Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186 (10th Cir. 1997); Hinds v. General Motors Corp., 988 F.2d 1039 (10th Cir. 1993); and McEwen v. City of Norman, Okla., 926 F.2d 1539 (10th Cir. 1991). During oral argument, Denny's simply maintained that Thomas' trial objection did not specifically address the last sentence of the Court's "Qualified Applicant" instruction.

CONCLUSION

Petitioner, Denny's, Inc., respectfully requests this honorable Court to grant this Petition for Writ of Certiorari, in order to resolve the conflict existing between the circuits, and even within the Tenth Circuit Court of Appeals, regarding what exactly a Plaintiff in a Title VII action must prove in order to establish a *prima facie* case, in

order that employers in this country have some guidance in the employee selection process, and, further, to guide the trial courts in determining the appropriate point in a Title VII lawsuit to instruct on the Price-Waterhouse mixed motive instruction in order to avoid costly and docket clogging retrials of cases. These two issues are critical to efficient and effective processing of employment and promotion applications and the resultant litigation when a "protected' employee or applicant is rejected for the position sought. This is especially critical because the *prima facie* case requirements and the mixed motive holding, both developed when these cases were tried to the court. Now tried to a jury, guidance for application to jury trials is essential. Left unreviewed, employers, the EEOC and the Federal Trial Courts are left with mixed directions from the appellate courts, conflicts within the various circuit courts of appeal, and employers such as the Petitioner herein, who operate nationally, are faced with differing standards and different rules they must operate under depending upon where their particular outlet is located.

Respectfully submitted,

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October 3, 1997

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONALD K. THOMAS, Plaintiff-Appellant, v. DENNY'S, INC., a California corporation, Defendant-Appellee.	No. 95-5146

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 91-C-715-C)

D. Gregory Bledsoe, Tulsa, Oklahoma (G. Steven Stidham and Brian S. Gaskill of Sneed, Lang, Adams & Barnett, Tulsa, Oklahoma, with him on the briefs), for Plaintiff-Appellant.

J. Patrick Cremin (Frank M. Hagedorn and Judith A. Colbert with him on the brief) of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, Oklahoma, for Defendant-Appellee

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Before **SEYMOUR**, Chief Judge, **PORFILIO** and **EBEL**, Circuit Judges.

SEYMOUR, Chief Judge.

Ronald K. Thomas brought this action under 42 U.S.C. § 1981 and 42 U.S.C. §§ 2000e et seq (Title VII) against his former employer, Denny's, Inc. (Denny's). Mr. Thomas alleged that he was denied promotions because of his race and in retaliation for the filing of discrimination charges, and that his failure to be promoted resulted in his

constructive discharge. The discrimination and retaliation claims under section 1981 were tried to a jury, which returned a verdict for Denny's. The district court ruled at trial that the evidence was insufficient to send the constructive discharge claim to the jury.[1] The court subsequently found against Mr. Thomas on his parallel Title VII claims.

On appeal, Mr. Thomas contends the trial court erred in instructing the jury on the definition of one of the elements of a prima facie case of discrimination under section 1981. He also contends the court erred in refusing to give a "mixed-motives" instruction, in failing to submit the constructive discharge claim to the jury, and in limiting the damages to the two year period prior to the filing of the lawsuit. We agree that the court's definition of the prima facie case was erroneous, and that the jury should have been given a "mixed-motives" instruction. Accordingly, we reverse the jury verdict on the section 1981 claims and remand for further proceedings. We also agree that the court's ruling in favor of Denny's on the Title VII claims must therefore be reversed. However, we affirm the court's refusal to send the constructive discharge claim to the jury, and we conclude that the court's limitation on the period for which Mr. Thomas could recover damages was proper.[2]

I

1

This action was filed September 12, 1991. Under then-existing law, a discriminatory discharge claim was not actionable under 42 U.S.C. § 1981. See Patterson v. McLean Credit Union, 491 U.S. 164, 179-80 (1989). "However, a racially discriminatory failure to promote [was] actionable under § 1981 if 'the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer.'" Patrick v. Miller, 953 F.2d 1240, 1251 (10th Cir. 1992) (quoting Patterson, 491 U.S. at 185). Although The Civil Rights Act of 1991, enacted November 21, 1991, in part overrode the Supreme Court's restrictive reading of section 1981 in Patterson, see id. at 1251 n.6, that Act does not apply retroactively, see Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029, 1032 (10th Cir. 1994). In this case, Denny's agreed that the promotions sought by Mr. Thomas were within the narrow ambit of section 1981 as construed in Patterson. As we discuss infra part VI, the court and the parties erroneously considered the constructive discharge claim under section 1981.

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Mr. Thomas also asserts on appeal that the district court erred in refusing to allow a witness to testify about Mr. Thomas' comparative qualifications, and in failing to adequately separate the race and retaliation claims for the .jury. Since the section 1981 claims must be retried and these issues may not arise on retrial, we do not consider them here.

BACKGROUND

Mr. Thomas, who is an African American, began his employment at Denny's in 1978 as a dishwasher/busboy. He was promoted to the position of cook in 1979 and soon became a trainer for new cooks. He first expressed interest in promotion to management in 1981. The promotion procedure at Denny's was not particularly structured. The turnover was high and the company was always looking for managers. Ordinarily, a general manager would recommend to a district manager that a particular employee under the general manager's supervision should be considered for promotion. Mr. Thomas was mentioned by several of his general managers as a likely candidate for promotion to management, and was interviewed a number of times. In 1984, he was interviewed by district manager Michael Kearney. In 1987, he had interviews with Debbie Reynolds, a district manager, and with Kenneth Agorichas, the personnel manager. In 1989, he was interviewed by district manager Herbert Rapier, and in 1992 he interviewed with district manager Hassib Darweesh and human resources manager Tom Taylor. At the time of each interview with a district manager, Mr. Thomas had been recommended for promotion by at least one of his general managers. In each instance in which Mr. Thomas was not promoted, the position was filled with a non-African American.

Irene Johnson, a general manager, testified that she believed Mr. Thomas was qualified for promotion as early as 1983. She recommended him to Ms. Reynolds in 1987, to Mr. Agorichas in 1988, and subsequently approached Mr. Rapier to express her interest in promoting Mr. Thomas. Mr. Thomas also presented the testimony of general manager Masood Kasim, who recommended Mr. Thomas to Ms. Reynolds several times, and to Mr. Rapier and Mr. Darweesh. Both Ms. Johnson and Mr. Kasim testified that their personal experience in supervising Mr. Thomas was the basis for their belief that he was qualified to be promoted to management. In addition, Shoib Ahmed, who worked with Mr. Thomas when they were unit aids for Ms. Johnson, testified that Mr. Thomas' performance as a unit aid was outstanding.[3] Mr. Thomas also presented evidence that his former manager, Joe Smith,

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[3] A unit aid runs the restaurant in the absence of a manager or assistant manager. The experience was often a stepping stone to a management position at Denny's. Mr. Thomas was a unit aid at Ms. Johnson's restaurant for several months along with Shoib Ahmed.

stated during a state human rights investigation that Mr. Thomas was at least as promotable as candidates hired off the street into the management training program.

Mr. Thomas filed a discrimination complaint with the Oklahoma Human Rights Commission in 1986. Ms. Johnson testified that when she brought up Mr. Thomas' name to Ms. Reynolds for promotion, Ms. Reynolds stated that they had a problem with Mr. Thomas, namely his suit against Denny's. When Ms. Johnson mentioned Mr. Thomas' promotion to Mr. Agorichas, he too mentioned that Mr. Thomas had a suit against Denny's. Mr. Rapier told Ms. Johnson that they would never allow Mr. Thomas to become a manager because he had sued Denny's. Mr. Kasim testified he told Mr. Darweesh that he wanted to take Mr. Thomas as a manager and asked why he had not been promoted. Mr. Darweesh stated: "Would you promote somebody who has sued?" Aplt. app. at 123.

Denny's presented evidence that Mr. Thomas did not answer questions well in his interviews, and was uncomfortable and unable to make eye contact. The interviewers felt that Mr. Thomas did not have a clear understanding of the goals and functions of management. Although Mr. Thomas was provided with management promotion packets, he did not complete them. These packets were not requirements for promotion, but were viewed as useful tools for assessing management potential.[4] Mr. Thomas was also advised to take some relevant college courses, which he did not do.

II
FAILURE TO PROMOTE

Mr. Thomas argues the trial court improperly instructed the jury on the element of a prima facie discrimination case that requires a plaintiff to show he was qualified for the position sought. "We review a district court's refusal to give a requested jury instruction for abuse of

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[4] An assistant manager was assigned to meet with Mr. Thomas to help him work on the material in the packets. Although Mr. Thomas missed several of these meetings, he testified that he was often kept waiting for long periods of time while the assistant manager worked with another management candidate, that meetings were set for 2:00 a.m., and that many of the meetings were scheduled early on a morning after Mr. Thomas had worked a late shift.

discretion. However, we review de novo the question of whether the court's instructions, considered as a whole, properly state the applicable law and focus the jury on the relevant inquiry." York v. American Tel. & Tel. Co., 95 F.3d 948, 953 (10th Cir. 1996) (citation omitted).

The framework for assessing discrimination claims that are not based solely on direct evidence is well known. The plaintiff has the initial burden of establishing a prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If the plaintiff does so, the defendant then has the burden of articulating a "legitimate, nondiscriminatory reason for the employee's rejection." Id. The plaintiff must then be afforded a full and fair opportunity to show that the employer's proffered reason was in fact a pretext for unlawful discrimination. See id. at 804. Although this analytical framework was first articulated in a Title VII case, it applies as well to claims under section 1981. See Durham v. Xerox Corp., 18 F.3d 836, 839 (10th Cir.), cert. denied, 115 S. Ct. 80 (1994).

> To establish a prima facie case of failure to be promoted on the basis of [race] discrimination, a plaintiff must show: (1) that []he was a member of a protected class; (2) that []he was qualified for the position; (3) that []he was rejected; and (4) that the position was filled by someone who was not a member of the protected class.

Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1469 (10th Cir. 1992).

Here we are concerned with the second element, the requirement that a plaintiff show he was qualified for the position sought. The district court defined this element for the jury as follows:

> To show that he was qualified, plaintiff must show that he possessed the necessary requirements for the position he sought. You should consider evidence concerning the education, training or experience necessary to perform the job. The plaintiff is not required to prove his qualifications were superior relatively [sic] to other employees in like positions. The plaintiff must prove, however, that he was at least as well qualified for the position as the person hired instead of him.

Aplt. app. at 19 (emphasis added). Mr. Thomas contends the court erred in adding the italicized sentence, arguing that it is directly contrary to this court's holding in Kenworthy.[5] We agree.

In Kenworthy we held the district court misapplied the law by holding that the defendant's proffered nondiscriminatory reasons for the plaintiff's rejection could prevent the plaintiff from establishing a prima facie case. 979 F.2d at 1469-70. We pointed out that relying on a defendant's reasons for the adverse action as a basis for ruling against a plaintiff at the prima facie stage raises serious problems under the McDonnell Douglas framework because it frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual. See id. at 1470. If at the prima facie stage the fact finder credits the reasons offered by the defendant for the failure to be promoted, the jury is not required to even consider the plaintiff's evidence on the critical issue of pretext. In Kenworthy and in MacDonald v. Eastern Wyoming Mental Health Ctr., 941 F.2d 1115 (10th Cir. 1991), upon which Kenworthy relied, we were concerned with subjective qualifications. Such subjective criteria "are particularly easy for an employer to invent in an effort to sabotage a plaintiff's prima facie case and mask discrimination." Ellis v. United Airlines Inc., 73 F.3d 999, 1005 n.8 (10th Cir.), cert. denied, 116 S. Ct. 2500 (1996). To avoid this result, we held, in agreement with other courts addressing the issue, that the employer's subjective reasons are not properly considered at the prima facie stage, and should instead be "considered in addressing whether those articulated reasons are legitimate or merely a pretext for discrimination." Id. Applying our holding, we stated that a prima facie showing can be made through credible evidence that a plaintiff was qualified even if that evidence was disputed by the employer, and that this burden may be met

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Notwithstanding the concession in its brief that Mr. Thomas had properly objected below, Denny's suggested for the first time at oral argument that Mr. Thomas did not adequately inform the trial court of his objection to this instruction in light of Kenworthy. This argument not only comes too late, Durham v. Xerox Co, 18 F.3d 836, 841 n.4 (10th Cir.), cert. denied, 115 S. Ct. 80 (1994), but our review of the record reveals that it is utterly lacking in merit. The exchange between court and counsel, as well as the court's order denying Mr. Thomas' motion for new trial, clearly reveal that the court understood the nature of the objection and simply did not agree with it. Indeed, counsel for Mr. Thomas quoted the relevant portion of Kenworthy to the court, which dismissed it as "the rhetoric of the appellate judges," aplt. app. at 136, and stated "[i]t can't be the law. That just can't be the law," id. at 137.

through the plaintiff's own testimony and that of co-workers who were in a position to know the plaintiff's qualifications. Id.[6]

In the instant case, as in Kenworthy and MacDonald, the qualifications at issue were purely subjective. As Denny's conceded in oral argument, it had no posted objective criteria that were applied across the board to all candidates for promotion. The record indicates that promotion decisions were made on an ad hoc basis, and were determined by the interviewer's subjective evaluation. Mr. Thomas presented evidence through his own testimony and that of Ms. Johnson, Mr. Kasim, Mr. Ahmed, and Mr. Smith that he was qualified to be promoted. This evidence was clearly sufficient under Kenworthy to establish a prima facie case and thus entitled Mr. Thomas to a proper instruction under which the jury could consider his evidence of pretext if it chose to credit his evidence of his qualifications. Instead, the jury found that Mr. Thomas had not established a prima facie case under the erroneous instruction directing it to consider Denny's evidence that Mr. Thomas was not as qualified as those promoted. Because the court improperly instructed the jury that such a finding eliminated the need for it to consider pretext, Mr. Thomas was deprived of the opportunity to show that Denny's proffered reasons were not worthy of credence. Accordingly, we reverse the verdict on the discrimination claim under section 1981 and remand for a new trial under proper instructions.[7]

6

Our holding in these circumstances may not be applicable to a case involving "objective hiring criteria applied to all applicants," Ellis v. United Airlines, Inc., 73 F.3d 999, 1005 n.8 (10th Cir.), cert. denied, 116 S.Ct. 2500 (1996), such as the weight qualifications at issue in Ellis, or the education and experience requirements involved in York v. American Tel. & Tel. Co., 95 F.3d 948, 952-54 (10th Cir. 1996).

7

On appeal, Denny's relies upon St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), to assert that the instruction here was proper. We find nothing in that case to cast doubt upon our holding in Kenworthy. In St. Mary's, the Court addressed whether "the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff," Id at 504, and decided that it did not. In passing, the Court reiterated its holding in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), that a plaintiff must establish a prima facie case by a preponderance of the evidence. That statement, however, does not shed light upon the issue here, namely, what evidence is properly considered by a fact finder in determining whether a plaintiff has met this initial burden. The Court in St. Mary's likewise did not directly address the problem with which we were concerned in Kenworthy, that collapsing the first and second stages of the

III
MIXED-MOTIVES INSTRUCTION

Mr. Thomas maintains the trial court erred in refusing to give the jury a "mixed-motives" instruction with respect to his claim that he was denied promotions in retaliation for the filing of a discrimination complaint. In Waterhouse v. Hopkins, 490 U.S. 228 (1989) the Supreme Court held that when a discrimination case challenges an employment decision that may have been "the product of a mixture of legitimate and illegitimate motives, . . . it simply makes no sense to ask whether the legitimate reason was 'the "true reason."'" Id. at 247.[8] The Court therefore rejected the argument that "the plaintiff in a mixed-motives case must squeeze [his] proof into Burdine's framework."Id. at 246-47. The Court held that "once a plaintiff . . . shows that [an improper motive] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the improper motive] to play such a role." Id. at 244-45 (footnote omitted). On appeal, Denny's asserts the instruction was not appropriate here because Denny's did not request the instruction and because the evidence did not warrant such an instruction in any event. We disagree with both arguments.

Although the Court in Price Waterhouse described the burden-shifting nature of the mixed-motives approach as "most appropriately deemed an affirmative defense," id. at 246, it does not follow from that statement that a mixed-motives instruction is only available when requested by the defendant. Indeed, in that case the defendant disputed

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McDonnell Douglas inquiry would eliminate the plaintiff's opportunity to present evidence of pretext to the fact finder at a point when the fact finder would be able to consider it. If anything, the analysis in St. Mary's supports the holding in Kenworthy. The Court in St. Mary's described the prima facie requirements as "minimal," 509 U.S. at 506, and pointed out that what is not required to establish a prima facie case "is a degree of proof so high that it would, in absence of rebuttal, require a directed verdict for the plaintiff .... Quite obviously, however, what is required to establish the McDonnell Douglas prima facie case is infinitely less than what a directed verdict demands," Id. at 515.

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The Civil Rights Act of 1991 superseded in part the mixed-motive analysis set out in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). Mr. Thomas does not argue on appeal that the 1991 Act applies to him and we therefore do not address the issue.

both that any discrimination occurred and that it played any part in the challenged decision. Id. at 255. As one court has explained:

> The Price Waterhouse principle often leads to the paradoxical situation ... of a plaintiff asking for a mixed-motive instruction. The Price Waterhouse issue does not arise for the trier of fact until the plaintiff has carried the burden of persuading the trier that the forbidden animus was a motivating factor in the employment decision but has failed to persuade the trier that non-discriminatory reasons proffered by the employer were pretexts and not also motivating factors. Once the presentation of evidence is sufficient to create this possibility, the employer has the option of defending on the Price Waterhouse ground that it would have made the same decision even in the absence of a discriminatory motive. Price Waterhouse is thus a defense. However, for tactical reasons. it is often only the plaintiff who asks for a Price Waterhouse instruction, for when requests to charge are submitted, the employer may well choose to avoid the burden-shifting language in the Price Waterhouse charge, hoping that the jury either will not find a forbidden animus or will believe the burden is on the plaintiff in the case of a mixed motive. We thus believe that the plaintiff will be entitled to a burden-shifting instruction on the Price Waterhouse defense where the evidence is sufficient to allow a trier to find both forbidden and permissible motives. In such circumstances, the failure to give such an instruction would create a risk that the jury, having agreed with the plaintiff s evidence that a forbidden animus played a motivating part in the employment decision but not with the plaintiff s contention that the employer's proffered explanations were pretextual, would mistakenly believe that the plaintiff had the burden of showing that the same employment decision would not have occurred in the absence of the forbidden motive.

Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 181 (2d Cir. 1992). We agree with the Second Circuit that a plaintiff is entitled to a mixed-motives instruction upon a proper evidentiary showing even if the

defendant does not request one. Accord Kenworthy, 979 F.2d at 1471 ("[O]nce a plaintiff has shown that an improper reason was a substantial or motivating factor in the defendant's adverse treatment, the employer must prove by a preponderance of the evidence that it would have reached the same decision even absent the improper motive.").

We also conclude that Mr. Thomas made such a showing here. "A plaintiff will be entitled to the burden-shifting analysis set out in Price Waterhouse upon presenting 'evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged [retaliatory] attitude.'" Kenworthy, 979 F.2d at 1471 n.5 (quoting Ostrowski, 968 F.2d at 182). As set out above, Mr. Thomas presented evidence through the testimony of Ms. Johnson and Mr. Kasim that several people involved in the promotion decision process had stated that Mr. Thomas would not be considered for promotion because of his discrimination complaint. Although Denny's points out on appeal that some of these decision makers denied making the statements, such credibility determinations are for the jury to make upon a proper instruction. We therefore reverse on the section 1981 retaliation claim and remand for a new trial.

IV
PARALLEL TITLE VII CLAIMS

Mr. Thomas argues that in the event we reverse the jury verdicts on the section 1981 claims and remand for a new trial, as we have done, we must also reverse the district court's findings of fact and conclusions of law rejecting his parallel claims under Title VII. We agree.

We considered these circumstances in Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988) (per curiam). In that case, as here, the plaintiff brought parallel actions under section 1981 and Title VII. After concluding that the section 1981 claim had to be retried, we pointed out:

> In a case under Title VII and § 1981 arising out of the same facts, the commonality of factual issues between the § 1981 and Title VII claims is nearly all-encompassing. The elements of each cause of action have been construed as identical, and a jury verdict on the issue of liability ... under § 1981 is normally

> conclusive on the issue of liability in a parallel action under Title VII.

Id. at 1444 (citations omitted).

We further observed:

> The strictures of the Seventh Amendment are particularly applicable in a case where, due to the presence of both equitable and legal issues, trial is both to the jury and to the court. In such a situation, when a case involves both a jury trial and a bench trial, any essential factual issues which are central to both must be first tried to the jury, so that the litigants' Seventh Amendment jury trial rights are not foreclosed on common factual issues.

Id. at 1443.

Because "the jury's findings on factual issues common to claims under § 1981 and Title VII are binding on the district court," id. at 1445 n.6, and because we have held that the section 1981 claims here must be retried to the jury, we must vacate the district court's ruling on the parallel Title VII claims as well to preserve the parties' Seventh Amendment rights.

V.
LIMITATION ON DAMAGES

Mr. Thomas contends the district court erred in instructing the jury it could only award damages for discrimination and/or retaliation occurring after September 12, 1989, the date two years prior to the filing of the lawsuit. The court thus ruled that the award of damages was limited by the applicable statute of limitations. Mr. Thomas maintains that he can recover damages beyond that period under a theory of continuing violation, asserting that because the alleged illegal acts began prior to the limitation period and continued up to the filing of the suit, he is entitled to recover for all of the continuing course of conduct.

This continuing violation theory is a creation of federal law that arose in Title VII cases. This theory recognizes that certain violations are continuing in nature and provides that a claim asserting such a violation

is timely if administrative charges are filed within the period applicable to the last act in the continuing series. See e.g., United Air Lines, Inc. v. Evans, 431 U.S. 553, 561-62 (1977) (Marshall, J., and Brennan, J., dissenting). Although this theory thus allows a plaintiff's claims to encompass acts that would otherwise be time-barred by the relatively short limit for filing administrative charges, a plaintiff can only receive back pay for the two years prior to the filing of administrative charges. See id.; see also 42 U.S.C. § 2000e-5(g).

As an initial matter, we have some doubt that a principle of federal law pertaining to a Title VII limitation period should be applied to a section 1981 claim. Mr. Thomas relies on the opinion in Chung v. Pomona Valley Community Hosp.,667 F.2d 788, 791 (9th Cir. 1982), in which the court concluded that the continuing violation rule did apply to a section 1981 claim, observing that while state law might govern the choice of an applicable period of limitation, federal law would govern the expiration of that period. Chung, however, was decided prior to the Supreme Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985), in which the Court held that when borrowing state limitation periods under 42 U.S.C. § 1988, a court must also borrow a state's "'provisions regarding tolling, revival, and questions of application.'" Id. at 269 n.17 (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464 (1975)).

Moreover, while the continuing violation theory as it functions in a Title VII case in essence extends the limitation period, it does not address the period within which damages can be recovered. That period, as we have stated above, is specifically limited by section 2000e-5(g) to the two years prior to the filing of administrative charges. See Kornegay v. Burlington Indus., Inc., 803 F.2d 787, 788 (4th Cir. 1986). Moreover, we agree with the court in Kornegay that because the continuing violation theory is a creature of the need to file administrative charges, and because a section 1981 claim does not require filing such charges before a judicial action may be brought, the continuing violation theory is simply not applicable. The state limitation period in a section 1981 suit serves the same function that section 2000e-5(g) performs in a Title VII case, that is, it provides a cap on the period for which damages can be recovered. Accordingly, the district court here properly instructed the jury that any damages awarded under section 1991 were to be limited by the applicable two year-statute of limitation.

VI

CONSTRUCTIVE DISCHARGE

Finally, we address Mr. Thomas' contention that the district court erred in refusing to send the constructive discharge claim to the jury. As we pointed out in note one, supra, under the law in effect at the relevant time, a claim of discriminatory discharge was not actionable under section 1981. See Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Thus the district court did not err in refusing to send the constructive discharge claim brought under section 1981 to the jury, even though the court did not rely on Patterson in so ruling. A claim of constructive discharge is, however, cognizable under Title VII. The court here ruled that the evidence was not sufficient to create a fact issue on the claim and would presumably have reached the same result if the claim had been asserted under Title VII. Because we are remanding this case for further proceedings and vacating the district court's disposition of the Title VII claims. We address the merits of the trial court's disposition briefly in the interests of judicial economy.

A plaintiff asserting a claim of constructive discharge must produce evidence that the "'employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign.'" Spulak v. K Mart Corp., 894 F.2d 1150, 1154 (10th Cir. 1990) (quoting Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986)). "'[P]roof of constructive discharge depends upon whether a reasonable [person] would view the working conditions as intolerable.'" Id. (quoting Derr, 769 F.2d at 344) (internal quotations omitted).[9] Our review of the record reveals that the conditions of Mr. Thomas' employment, viewed most favorably to his claim, do not rise to the level necessary to create a fact issue on this claim, and that the district court was therefore correct in so ruling.

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[9] Denny's argues on appeal that this claim must fail in part because Mr. Thomas presented no evidence that the actions of which he complains were taken by Denny's personnel with the specific intent to force him to resign. We have held, however, that the employer's subjective intent is irrelevant and that the employer will be held to have intended the reasonably foreseeable consequences of its acts. See Spulak v. K Mart Corp., 894 F.2d 1150, 1154 (10th Cir. 1990) (quoting Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986)). Thus the lack of evidence of Denny's specific intent to force Mr. Thomas to resign does not, of itself, defeat his constructive discharge claim.

In sum, we REVERSE the jury verdict on the section 1981 claims asserting discriminatory and retaliatory failure to promote. We also REVERSE the district court's disposition of the Title VII claims. We REMAND these claims for further proceedings in light of this opinion. We AFFIRM the district court's ruling that Mr. Thomas can recover damages only for the two years preceding the filing of his lawsuit, and we AFFIRM the lower court's disposition of the constructive discharge claim.

REVERSED in part, AFFIRMED in part, and REMANDED for further proceedings.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 91-C-715-C**
	)	
DENNY'S, INC.,	)	
	)	
Defendant.	)	

JUDGMENT

This matter came before the Court for non-jury trial on plaintiff's claims brought pursuant to Title 42, United States Code, Section 2000e. The issue having been duly considered and a decision having been rendered in accordance with the Findings of Fact and Conclusions of Law filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for defendant, Denny's, Inc., and against plaintiff, Ronald K. Thomas.

IT IS SO ORDERED this 7th day of June, 1995.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 91-C-715-C**
	)	
DENNY'S, INC.,	)	
	)	
Defendant.	)	

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This matter came before the Court for trial by jury January 17 through 30, 1995. Plaintiff asserted claims of race discrimination and retaliation. The jury considered plaintiff's claims under Title 42, United States Code, Section 1983, and returned separate verdicts in favor of the defendant as to each claim. Simultaneously for nonjury consideration, the Court considered plaintiff's claims under Title 42, United States Codes, Section 2000e, Title VII of the 1964 Civil Rights Act.

The scope of the Court's consideration of the evidence is from 1981, when plaintiff first expressed to Denny's his interest in being promoted to management, through November 1991, the effective date of the amendment to Title VII.

Plaintiff, an African-American citizen, alleges that from the onset of his employment with Denny's in 1978, he performed at all times as an employee capable of being promoted to a position in management. Plaintiff asserts that he first expressed a desire to be promoted to management in 1981, and that he continued to request promotion until his employment with Denny's ended in 1993. Plaintiff asserts that he demonstrated the ability and willingness to be a manager. Plaintiff asserts that non-African-American employees with fewer qualifications and experience were Promoted to management.

In 1986, Plaintiff filed a complaint of race discrimination with the Oklahoma Human Rights Commission. Plaintiff asserts that after he filed his complaint, despite his qualifications, the defendant retaliated against him by refusing to promote him into management.

In response, Denny's denies discriminating against the plaintiff in any manner. Denny's contends that its managers interviewed and evaluated plaintiff's qualifications for a management position on several occasions, but that plaintiff did not demonstrate the skills, knowledge and ability to be promoted. Denny's offered plaintiff the opportunity to participate in a preparatory management program. Denny's contends that plaintiff showed little interest in the program and failed to complete it. Denny's denies that plaintiff was a qualified candidate for management and denies retaliating against the plaintiff. Denny's also denies that race was a factor in its decision not to promote the plaintiff.

After consideration of the pleadings, testimony and exhibits admitted at trial, the briefs and arguments presented by counsel, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Jurisdiction and Venue

1. Plaintiff Ronald K. Thomas is a male African-American citizen of the United States, a resident of Tulsa, Oklahoma, and this judicial district.

2. Defendant Denny's is a California Corporation doing business in the State of Oklahoma.

3. Denny's was at all times pertinent to this action engaged in an industry affecting commerce with fifteen or more employees for each of twenty or more calendar weeks in the current or proceeding calendar year.

4. During his employment with Denny's, plaintiff worked at various restaurants located in the Tulsa area which are owned and operated by Denny's.

5. Plaintiff timely filed charges of race discrimination with the Oklahoma Human Rights Commission which were transferred to the Equal Employment Opportunity Commission (EEOC).

6. In 1990, the EEOC issued a "no-cause" determination, concluding that Denny's had not discriminated against the plaintiff. In 1991, the EEOC dismissed plaintiff's complaint and issued a Notice of Right to Sue. Plaintiff filed another complaint with the EEOC in 1993, and subsequently amended his complaint. Plaintiff's second complaint, as amended, was dismissed by the EEOC.

7. Plaintiff timely filed the action herein.

B. Background

8. In 1978, at the age of seventeen, plaintiff was hired by Denny's as a service assistant (dishwasher/busboy).

9. Plaintiff graduated from high school in 1979, and was promoted by Denny's to the position of cook.

10. Directly after high school plaintiff attended Spartan School of Aeronautics, a vocational/technical school, while working part time as a cook at Denny's. In 1980, plaintiff discontinued his education at Spartan without receiving a degree and worked full time for Denny's. Plaintiff's job performance as a cook was good and he became a "cook trainer" for Denny's new employees.

11. At plaintiff's request in 1981, plaintiff was interviewed by Terry Lee, a district manager with Denny's, for possible promotion to management.

12. In 1982, plaintiff spoke to James Carney, a general manager with Denny's, regarding his desire to be promoted to management.

13. In 1984, plaintiff completed an application and was formally interviewed by Michael Kearney, a general manager, for a management position. Plaintiff was interviewed approximately ten times between 1981 and 1993 for promotion into management.

14. In 1985, Denny's offered plaintiff the opportunity to participate in the Preparatory Management Program, (the "PMP"). The PMP is a self-motivated program designed to aid individuals who are interested in a management position and a mechanism used by management to assess an individual's potential skills as a manager. Although there is no predetermined time in which to complete the program, those who successfully completed the program could be offered entry into the Management Training Program (MIT). Employers with prior restaurant experience or with prior college training qualified for direct participation in the MIT program.

15. Richard Clemons, an assistant manager at Denny's, reviewed the requirements of the PMP packet with plaintiff. Plaintiff failed to appear at several meetings which were scheduled by Mr. Clemons as part of the program. After approximately eight weeks of effort, plaintiff dropped the PMP without completing its requirements. Plaintiff did not make a dedicated effort to complete the PMP.

16. Irene Johnson, a unit manager who was fond of the plaintiff, provided him the opportunity to work as a unit aid. A unit aid functions in a quasi-management position overseeing the restaurant activities and filling in for any absent restaurant employee. Ms. Johnson considered plaintiff a good employee and recommended him to the district manager for participation in the MIT.

17. In his performance reviews by management from 1978 through 1992, plaintiff received average to below standard ratings through the mid-1980's. In the late 1980's, plaintiff's ratings increased to above average although there were some intermittent below standard ratings. Plaintiff's physical appearance throughout his employment was below the standards required by Denny's.

18. Plaintiff was considered by all Denny's managers to be a good cook and a diligent worker.

19. The majority of the employees who entered and successfully completed the MIT were either college graduates, had completed relevant college courses, or had prior management experience. Plaintiff had not taken any college courses. Denny's recommended that the plaintiff attend a local college as preparatory training for promotion, but plaintiff did not follow through with the

recommendation. Plaintiff failed to show any incentive to take the necessary steps which would lead to a managerial position.

20. There is no indication that plaintiff worked in a racially hostile environment. The evidence was undisputed that plaintiff was well liked by his co-workers, and there was an absence of any racial slurs directed toward the plaintiff or other African-American employees.

21. Although a few of Denny's local managers recommended plaintiff for participation in the MIT, there was no evidence that plaintiff had the requisite management experience or college education necessary to qualify him for the MIT program or direct promotion into management.

22. The district managers, general managers, and the personnel manager who interviewed Plaintiff unanimously testified that Plaintiff lacked the requisite communication skills, professional presence, business ability, and initiative to enter the MIT or be promoted to an assistant manager or manager. It was recommended that plaintiff enroll in some business courses to acquire skills in business management including accounting, marketing and management discipline. Again, plaintiff failed to take the required initiative to qualify for the position he sought.

23. The evidence established that there were several white employees who were offered participation in a preparatory management training program, but they failed to complete the program and accordingly were not considered for management. There was also evidence that several white assistant managers were not promoted to manager. A bona fide employment qualification was the determining factor used by upper management for selection of employees for promotion to a unit manager. There is a complete absence of evidence that race played any part in Denny's promotion policy.

24. Denny's promoted Imogene Warren and Andy Goodwin into management. Both of these employees are African-American. Imogene Warren had taken bookkeeping and accounting courses prior to joining Denny's. Andy Goodwin started at Denny's as a cook and qualified for the management program. Denny's also offered a management position to John Meaus, an African-American male, but he declined the offer in order to complete his college education.

25. There was no evidence to indicate that plaintiff was retaliated against by Denny's for having filed a race discrimination complaint with the Oklahoma Human Rights Commission in 1986. Both prior to and after filing the complaint, plaintiff lacked the necessary qualifications for participation in the MIT or for promotion into management, and plaintiff lacked the fortitude to obtain the training or education which would have qualified him for a management position.

26. Plaintiff had little knowledge of the restaurant industry, business ability or management skills even though he was considered to be a good cook, a good employee and had been employed with Denny's since 1979.

27. Plaintiff was interviewed in 1986 by Debbie Reynolds (the district manager), Ken Agorichas (the human resource manager), and Jaimie Cullinan (a general manager). Collectively these managers concluded that plaintiff lacked the initiative, commitment, education and ability to qualify for a management position. The Court finds that this conclusion is supported by the evidence.

28. At his request, in 1992, plaintiff was again interviewed by Denny's for a management position. Plaintiff had not completed the PMP package or enrolled in any college courses. Throughout the course of his employment, plaintiff failed to act upon the suggestions of management to qualify for participation in the MIT program. Plaintiff's request for promotion was again denied in 1992. On February 13, 1993, plaintiff voluntarily resigned his position as a cook with Denny's.

CONCLUSIONS OF LAW

A. Jurisdiction and Venue

1. All filing requirements of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000(e)-(5)(e) which are prerequisites to the jurisdiction of this Court have been satisfied by the plaintiff.

2. The defendant is an employer within the meaning of 42 U.S.C. §2000e-(b).

B. Nonliability of Defendant Denny's

3. Denny's did not commit unlawful acts of race discrimination or retaliation against the plaintiff by its failure to promote plaintiff into management.

4. In order to establish a prima facie case of race discrimination by failure to promote, plaintiff must show by a preponderance of the evidence each of the following essential elements: (1) that he is a member of the class protected by the statute; (2) that he applied and was qualified for an available position in management; (3) despite his qualifications, he was rejected by defendant's failure to promote him; and (4) after he was rejected the defendant continued to seek applicants for positions in management, and that the defendant filled the management positions with non-African American employees. See, Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1469 (10th Cir. 1992) and St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

5. The Court concludes that plaintiff did not establish his prima facie case of race discrimination by a preponderance of the evidence. First, the evidence established that the plaintiff was not qualified to either participate in the MIT program or be promoted into management. Plaintiff lacked the initiative to complete the PMP package which would have positioned him to commence the MIT program. Neither did plaintiff take relevant college preparatory classes to acquire a basic understanding of business and finance.

6. The Court concludes that those individuals who were invited to participate in the MIT program and were advanced to management had either (1) prior management experience in the industry, (2) had completed several college preparatory course, or (3) had obtained a college decree. Rudimentary educational skills were necessary prerequisites for participation and completion of the MIT program. Plaintiff lacked both the initiative and ability to complete even the PMP package which indicated his lack of readiness for the MIT program and a management position.

7. Second, plaintiff failed to establish by a preponderance of the evidence that Denny's failed to promote qualified African-Americans into management or allow them participation in the MIT program. The evidence established that Denny's promoted qualified African-Americans to management.

8. In order to establish a prima facie case of retaliation, plaintiff must show: 1) protected opposition to discrimination; (2) adverse action by an employer contemporaneous with or subsequent to the employee's protected activity; and (3) a causal connection between such activity and the employer's action. Purrington v. University of Utah, 996 F.2d 1025, 1033 (10th Cir. 1993).

9. In order to meet this burden, plaintiff must show a "a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions. "Id.

10. Plaintiff failed to establish a "causal connection" between his filing a charge of race discrimination and Denny's decision not to promote him to management and/or not to offer him participation in the MIT program. The Court concludes that the defendant's failure to promote plaintiff into management was unrelated to plaintiff filing a charge of race discrimination. The evidence established that there was no difference in the manner in which the defendant treated the plaintiff regarding its decision not to promote him to management either prior to or after plaintiff filed the complaint with the Oklahoma Human Rights Commission. Thus, plaintiff failed to establish a causal connection evidencing retaliation.

11. Plaintiff failed to show that Denny's engaged in any discriminatory or differential treatment which would support a claim of race discrimination or retaliation.

Based on the evidence presented, the Court concludes that the plaintiff, Ronald K. Thomas, has failed to establish either his prima facie case of race discrimination or retaliation. Accordingly, the Court finds in favor of the defendant Denny's, Inc. on plaintiff's claims under Title 42, United States Code, Section 2000e, Title VII of the 1964 Civil Rights Act.

IT IS SO ORDERED this 7th day of June, 1995.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 91 C-715-C**
	)	
DENNY'S, INC.,	)	
	)	
Defendant.	)	

JUDGMENT

Judgment, pursuant to unanimous jury verdict, is entered in favor of the Defendant, Denny's Inc., and against Plaintiff, Ronald K. Thomas, on his claims of failure to promote based on race discrimination in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and retaliation for filing a charge of race discrimination, also under Section 1981. This Court previously determined that any jury claims under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) after the effective date of the Civil Rights Act of 1991 would not be actionable, pursuant to 42 U.S.C. § 1981a(a)(1), since Plaintiff had claims under Section 1981. This Court also previously granted Defendant's Motion For Judgment As A Matter Of Law on Plaintiff's claims for constructive discharge under Section 1981 and for infliction of emotional distress.

The Court has reserved for its own determination and will issue separate Findings of Fact and Conclusions of Law on Plaintiff's non-jury claims of failure to promote based on race discrimination and retaliation for filing a charge of race discrimination in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., to the extent that they are not disposed of by the jury's verdict on the Section 1981 claims.

ENTERED this 21st day of February, 1995.

/s/ H. Dale Cook
H. DALE COOK
Senior United States District Judge

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THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS	)	
	)	
	)	
VS.	)	NO. 91-C-715-C
	)	
DENNY'S, INC.	)	

INSTRUCTIONS TO THE JURY

OPENING -- PROVINCE OF THE COURT

Ladies and gentlemen of the Jury, it is now time for the Court to advise you as to the law to apply in this case; and I ask that you pay close attention -- as you have during the trial -- because you must consider all of these instructions in your deliberations.

You have heard the evidence and the arguments, and the Court now instructs you as to the law governing the case.

Although you as Jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law, so given, to the facts as you find them from the evidence presented to you.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given to you in these instructions from the Court.

CONSIDER WHOLE INSTRUCTIONS

You are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all instructions as a whole; and you are to regard each instruction in the light of all the others.

PLAINTIFF'S- BURDEN OF PROOF

In this case it is the responsibility of the plaintiff to prove every essential part of his claim by a "preponderance of the evidence." This is sometimes called the "burden of proof."

You are instructed that the term preponderance of the evidence does not necessarily mean the greater number of witnesses. Rather, a "preponderance of the evidence" simply means an amount of evidence which is enough to persuade you that the plaintiff's claim is more likely true than not true.

In deciding whether any fact has been proved by a preponderance of the evidence you may consider the testimony of all the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

SHIFTING BURDENS -- BOTH PARTIES

There are two concepts in a civil rights trial that are distinguishable. The first concept is what is called the "burden of proof" as to the ultimate trial issue. In this case the ultimate trial issue is whether Denny's intentionally and purposefully discriminated against the plaintiff Ronald Thomas, by its failure to promote him to management based on his race. As previously instructed, the burden of proof at all times remains the responsibility of the plaintiff.

The second concept involves a shifting of responsibility between the parties to produce evidence to the jury to persuade you of a fact. This is commonly referred to as a "burden of persuasion."

In an action based on allegations of race discrimination under the Civil Rights Act, the plaintiff has the initial burden of establishing a "prima facie" case of discrimination by a preponderance of the evidence. Later in these instructions, the elements necessary for plaintiff to establish a prima facie case will be provided to you.

If plaintiff establishes a prima facie case by a preponderance of the evidence, a presumption of discrimination arises. The defendant then has a burden of production, to rebut this presumption by stating a legitimate nondiscriminatory reason for its actions toward plaintiff.

If the defendant articulates reasons for not promoting plaintiff other than race discrimination a factual dispute exists, then the burden shifts back to the plaintiff to persuade you by a preponderance of the evidence that defendant's stated reasons are pretextual, that is, a cover up for a racially discriminatory motive.

As previously stated, even though this formula proves a shifting of the burden of persuasion and production of evidence, the overall burden of proof as to the ultimate trial issue as to whether the defendant engaged in purposeful and intentional race discrimination remains with the plaintiff at all times.

INFERENCES AND PRESUMPTIONS -- DEFINED

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is a conclusion which the law requires the jury to make from particular facts in the absence of convincing evidence to the contrary, but, unless so outweighed the jury is bound to find in accordance with the presumption.

CLAIMS AND DEFENSES

This is a civil action brought by the plaintiff Ronald Thomas against the defendant Denny's, Inc. seeking money damages for alleged racial discrimination in violation of his civil rights. Plaintiff brings this action pursuant to the Federal Civil Rights Act, Title 42, United States Code, Section 1981.

In support of his claim plaintiff an African-American citizen alleges that he was employed by Denny's, Inc. from 1978 until February 12, 1993. Plaintiff asserts that in the early 1980's Denny's failed to promote him to a position of manager and/or assistant manager because of his race. Plaintiff asserts that from the time of his employment in 1978 and throughout his employment with Denny's, he performed at all times as an employee capable of being promoted and capable of being a candidate for the position of manager and/or assistant manager, and that he continued to express that desire to be promoted to management until his employment with Denny's ended in 1993. Plaintiff asserts that he demonstrated the ability and willingness to perform all requirements necessary to become a manager and/or assistant manager. Plaintiff further asserts that non-African-American

employees with fewer qualifications and experience were promoted to management positions.

Plaintiff seeks compensatory damages in the form of back wages for which he alleges he would have earned if he had been promoted to management by Denny's and compensatory damages for his alleged emotional suffering as a consequence of the alleged discriminatory treatment by Denny's.

Additionally, plaintiff alleges that after he filed a claim of discrimination against Denny's, Denny's retaliated against him by failing to promote him to management.

In response to these allegations, Denny's denies that it discriminated against the plaintiff in any manner. Denny's contends that its managers considered and interviewed plaintiff, Ronald Thomas, for a management position on several different occasions, but that plaintiff did not demonstrate the skills and knowledge to be promoted into management. Denny's contends that it attempted to assist plaintiff to improve his skills, but alleges that plaintiff made very little progress. Denny's further asserts that plaintiff failed to actively pursue a management position at Denny's in that he allegedly failed to complete Denny's preliminary training program, allegedly failed to perform other objectives requested of him in order to get into management and allegedly failed to appear for meetings as scheduled by Denny's. Denny's further denies that plaintiff was as or better qualified for a management position than the other persons selected by Denny's.

Denny's denies plaintiffs claim of race discrimination by asserting that it placed qualified African American in management positions during plaintiff's employment with Denny's. Further, Denny's denies plaintiff's claim of retaliation and asserts that its actions regarding the plaintiff, Ronald Thomas, were nondiscriminatory and were made for legitimate business reasons.

CLAIMS OR DEFENSES NOT PROOF

The claims of the plaintiff and the defenses of the defendant are provided to you simply to define the issues to be tried between the parties, and such statements do not constitute proof of any fact in issue in this case.

CORPORATION CAN ACT ONLY THROUGH ITS MANAGERS AND EMPLOYEES

A corporation such as Denny's, Inc. is in law a person; but of course it cannot act otherwise than through its directors, managers or employees. A corporation is responsible for the acts of its directors, managers, or employees, provided such acts are done within the actual, apparent, or adopted scope of such directors, managers or employees authority, as would usually be the case if done in the ordinary course of such director, manager or employee's employment, or in the ordinary course of the corporation's business.

When the act of the director, manager or employee is within the scope of that person's employment or apparent authority, it is the act of the corporation itself; and the corporation is held legally responsible for it.

ALL PERSONS EQUAL BEFORE THE LAW -- CORPORATIONS

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons. All persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

PLAINTIFF'S CLAIMS
42 U.S.C. § 1981

Plaintiff asserts two claims for violation of his civil rights under Title 42, United States Code Section 1981, based on allegations of race discrimination by Denny's failure to promote him into management.

In this regard plaintiff asserts that he commenced working for Denny's, Inc. in 1978 primarily performing the duties of a cook receiving an hourly wage. Plaintiff asserts that some time prior to 1985 he made application to enter into a new contractual relationship with Denny's by applying for a position in management. This new position would include new monetary benefits.

Under plaintiff's first claim he asserts that Denny's denied him the right to enter into this new contractual relationship by its failure to promote him to management because of his race.

Under plaintiff's second claim, he asserts that Denny's denied him the right to enter into a new contractual relationship by its failure to promote him in retaliation for having filed a claim of discrimination.

STATUTE DEFINING THE CLAIM
42 U.S.C. § 1981

The statutory provision in which plaintiff asserts his claim, Title 42, United States Code, Section 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The purpose of Section 1981 is to secure freedom to all persons and to protect individuals in the full enjoyment of the rights of persons and property by prohibiting all racially motivated discrimination.

THE RIGHT TO CONTRACT
42 U.S.C. § 1981

Section 1981 guarantees each person, regardless of race, freedom from discrimination in the making and enforcing of contracts. The opportunity to contract, or enter into agreements, is denied in violation of Section 1981 when, on the basis of race, a defendant refuses to contract at all or when, on the basis of race it varies the terms of its offers or acceptances to contract. If, because of his race, the plaintiff is denied the right to contract entirely, or is given less opportunity to contract, or is offered less favorable contractual terms or unequal treatment so as to discourage him from entering the contract, he has a claim under Section 1981.

ESSENTIAL ELEMENTS OF PLAINTIFF'S PRIMA FACIE CASE FAILURE TO PROMOTE

To establish a prima facie claim of failure to promote on the basis of race under 42 United States Code, Section 1981, plaintiff Ronald Thomas

must prove by a preponderance of the evidence each of the following four elements:

1. That he is a member of the class protected by the statute;
2. That he applied and was qualified for an available position in management;
3. Despite his qualification, plaintiff was rejected by defendant's failure to promote him; and
4. That after plaintiff was rejected the defendant continued to seek applicants for positions in management, or that defendant filled the management positions with non-African- American employees.

QUALIFIED APPLICANT - DEFINED

To meet his initial burden, the plaintiff must prove that he was qualified for the position for which he applied. To show that he was qualified, plaintiff must show that he possessed the necessary requirements for the position he sought. You should consider evidence concerning the education, training or experience necessary to perform the job. The plaintiff is not required to prove his qualifications were superior relatively to other employees in like positions. The plaintiff must prove, however, that he was at least as well qualified for the position as the person hired instead of him.

ESSENTIAL ELEMENTS OF PLAINTIFF'S
PRIMA FACIE CASE
RETALIATION

Regarding plaintiff's second claim of retaliation, you are instructed that to establish a prima facie claim of retaliation under 42 United States Code, Section 1981, plaintiff Ronald Thomas must prove by a preponderance of the evidence each of the following elements:

1. That he engaged in protected opposition to race discrimination or participated in a legal process arising out of race discrimination;
2. That he suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and
3. There is a causal connection between the protected activity and adverse employment action.

You are instructed that by plaintiff filing a claim of race discrimination with a state or federal agency, the first element of the above prima facie case is satisfied.

You are further instructed as to the second and third element, plaintiff asserts that the "adverse employment action" was Denny's decision not to promote plaintiff to a management position by reason of race and/or retaliation for filing a claim of race discrimination.

CAUSAL CONNECTION -- DEFINED

The requisite causal connection may be established by evidence of circumstances that justify an inference of retaliatory motive or intent.

DISCRIMINATORY-- INTENT

To establish his case under section 1981, the plaintiff must convince you by a preponderance of the evidence that the defendant was motivated by a racially discriminatory purpose - that is, the plaintiff must prove that the defendant intentionally and purposefully discriminated based on race and/or retaliated against him because he filed a claim based on race discrimination.

In determining whether the defendant intentionally, discriminated and/or retaliated on the basis of race, you may consider all the evidence presented in the case. The plaintiff may use either direct or indirect evidence to meet this burden in attempting to prove that the defendant intended to discriminate and/or retaliate against him. You should also understand that the plaintiff must prove that the defendant actually was motivated by a racially discriminatory purpose as to plaintiff's race discrimination claim. It is not enough for the plaintiff to show, for example, that the defendant's conduct had a negative impact on members of the plaintiff s race or that a policy of the defendant, neutral on its face, had a disproportionate negative effect on members of his race. When taken together with other evidence, such evidence may prove that the defendant was motivated by a racially discriminatory purpose. You must remember, however, that the mere existence of such disparities does not automatically demonstrate a discriminatory intent.

DIRECT EVIDENCE OF INTENT
42 U.S.C. § 1981

The plaintiff, Ronald Thomas, may prove that Denny's was motivated by a racially discriminatory purpose by presenting direct evidence. Direct evidence is evidence which, by its very nature, speaks to the issue sought to be proved. An example of direct evidence, would be a statement by an employee, manager or officer of Denny's that he/she intended to discriminate and/or retaliate against plaintiff Ronald Thomas or the racial group to which plaintiff belongs. Plaintiff is not required to prove his case by direct evidence, but may do so. You should consider direct evidence along with all of the evidence in the case and determine whether it convinces you, by a preponderance of the evidence, that Denny's was motivated by a racially discriminatory purpose.

INDIRECT EVIDENCE OF INTENT
42 U.S.C. SECTION 1981

Plaintiff, Ronald Thomas, may prove Denny's was motivated by a racially discriminatory purpose by presenting indirect evidence. Indirect evidence is evidence, (historical, comparative, or individual) which, though it does not speak directly to the issue sought to be proved, provides the basis for an inference with regard to this issue. An example of indirect evidence would be evidence that an apparently neutral policy consistently and strongly works to the disadvantage of the group to which plaintiff belongs.

The plaintiff may use such evidence in attempting to prove to you that the defendant was motivated by a racially discriminatory purpose, and, if you believe the evidence establishes that fact, you may use it as the basis of your finding of intent.

As you consider this evidence, remember that the plaintiff must prove more than the occurrence of isolated or accidental acts; he must establish by a preponderance of the evidence that the defendant intentionally discriminated and/or retaliate against him on the basis of race. You should consider the plaintiff's indirect evidence along with all of the evidence in the case and determine whether it proves by a preponderance of the evidence, that the defendant was motivated by a racially discriminatory purpose.

DISCRIMINATION -- BASED ON RACE

The Civil Rights Act 42 U.S.C. Section 1981 is directed only at racial discrimination. In this lawsuit plaintiffs claim is limited to allegations of racial discrimination. You must determine whether the discrimination, if any, involved in this case was racial discrimination. It is not necessary, in order to determine that the discrimination was based on race, for you to find that the class being discriminated against constitutes a discrete "race", as that term is commonly understood today. If the plaintiff was subjected to intentional discrimination because of his ancestry or ethnic characteristics, then you should find that the alleged discrimination was based on race if you find such discrimination was a determining factor. If, however, you believe that the alleged discrimination was not based on race, but rather on other factors, such as sex, then you must find for the defendant, Denny's.

NONDISCRIMINATORY REASON
42 U.S.C. SECTION 1981

You are advised that if plaintiff Ronald Thomas establishes the essential elements of his prima facie claims of discrimination and/or retaliation by a preponderance of the evidence, the burden then shifts to the defendant to state a legitimate non-discriminatory reason for its actions toward plaintiff. In doing so, Denny's need not prove the absence of a discriminatory motive. Denny's must merely produce evidence that dispels the presumption of discriminatory intent as to each of plaintiff's prima facie claims. If the defendant does not present a legitimate non-discriminatory reason, you should take into consideration the presumption of race discrimination the prima facie evidence establishes.

In this action Denny's asserts that its decision not to promote plaintiff was due to plaintiff's lack of qualifications and/or his failure to complete the management training program.

You are advised that it is not up to you to determine whether Denny's decision not to promote plaintiff to management was a wise business decision. Such a determination is irrelevant to the issue of race discrimination.

"PRETEXT" -- DEFINED

In this action plaintiff asserts that Denny's articulated reasons for its failure to promote him to management is pretextual or a cover-up for race discrimination and/or retaliation.

In order to establish that a reason is pretext the plaintiff must show that the defendant's stated reason is not the motivating reason for the action and that the real reason was more likely discriminatory in purpose, or the plaintiff must show that the articulated reason is unworthy of credence.

A pretextual reason is not a true reason; it is unworthy of belief. The plaintiff may show by direct or indirect evidence that the defendant's proffered explanation is unworthy of credence by relying solely on evidence presented in establishing a prima facie case or by introducing additional evidence.

When you consider the plaintiff's evidence that the reason advanced by the defendant is a pretext, keep in mind that the relevant question is whether the defendant's reason was not the real reason for his actions. The question is not whether the defendant's reason showed poor or erroneous judgment. You are not to judge the defendant's wisdom. You are to decide whether Denny's intentionally discriminated against the plaintiff because of his race.

AN EMPLOYER HAS NO DUTY TO SHOW PREFERENTIAL TREATMENT TO EMPLOYEES

Section 1981 of the Civil Rights Act was intended to prohibit arbitrary race discrimination and to promote equality of treatment and opportunity among persons without regard to race. The law does not require an employer to extend preferential treatment to any person simply because of his or her race. An employer has no duty or obligation to structure employment policies and practices in force so as to favor the retention of black employees. Employers may select any person for promotion for any reason, so long as race or filing a race discrimination claim is not a determinative factor in the selection. Denny's was not obligated to give plaintiff any special opportunities, special consideration, or special treatment simply because of his race.

COMPENSATORY DAMAGES -- GENERALLY
42 U.S.C. §1981

In the event you find by a preponderance of the evidence that plaintiff has proven his claim of failure to promote based on race discrimination under 42 U.S.C.§1981 as defined under these instructions, then you must determine the amount of damages that plaintiff has sustained for the injury you believe he has suffered as a result of Denny's racially discriminatory conduct.

In considering the issue of plaintiff's damages under these sections, you are instructed that you should assess the amount you find to be established by a preponderance of the evidence as just and reasonable compensation for plaintiff's damages, no more and no less.

Although it is often impossible to arrive at a precise award, any award of compensatory damages is not allowed as punishment and cannot be imposed or increased to penalize the defendant. Neither can this form of damages be based on speculation or guesswork because it is only actual damages that are recoverable.

If you find that Denny's acted unlawfully as defined in these instructions the plaintiff, Ronald Thomas, is entitled to recover back wages and any pain, suffering or mental anguish that plaintiff experienced as a direct consequence of Denny's unlawful conduct. You will consider the issue of liability separately as to plaintiff's claims of discrimination for failure to promote and for retaliation.

DAMAGES -- STATUTE OF LIMITATION

In this action plaintiff, Ronald Thomas, asserts that defendant's racially discriminatory conduct in failure to promote him to management occurred in the early 1980's. Prior to considering the issue of damages, vou must determine the first date and each subsequent date, if any, in which the defendant failed to promote the plaintiff because of his race and/or retaliation. If, however, you find that Denny's did not discriminate and/or retaliate against plaintiff after September 12, 1989, your deliberations will be concluded and you should return a verdict for the defendant.

If, on the other hand, you find that the defendant racially discriminated and/or retaliated against plaintiff by failure to promote him

into management at any time after September 12, 1989, then you must proceed to determine an award of damages in favor of the plaintiff.

Any award of damages that is established for Denny's failure to promote plaintiff must be calculated from the first date you determine that Denny's actually failed to promote plaintiff because of his race and/or because of retaliation -- to the date that plaintiff terminated his employment with Denny's.

However, any award of damages may not be calculated prior to September 12, 1989, that being, two years prior to plaintiff filing this lawsuit on September 12, 1991. Such limitation period is controlled by the provisions contained within the Civil Rights Act.

DETERMINATION OF BACK WAGES

In determining an award of loss of wages in the form of "back pay" you should consider the following elements to the extent you find such elements proved by a preponderance of the evidence:

FIRST: You must determine and list on the verdict form the date or dates in which plaintiff was denied promotion to management based on his race and/or based on retaliation.

SECOND: You must then determine the difference between any wages which plaintiff actually earned while working for Denny's and those wages plaintiff should have earned had he not been discriminated against by Denny's.

MENTAL PAIN AND SUFFERING -- DETERMINATION

Damages that you award plaintiff should also provide compensation for any injuries caused by impairment of reputation, personal humiliation, embarrassment and emotional and mental anguish.

A determination of compensatory damages for emotional distress and humiliation under section 1981 may be difficult to calculate. Nonetheless, it is necessary to arrive at a reasonable award that is supported by the evidence offered by the plaintiff. There must be evidence presented

at trial to support your award of general compensatory damages, for an award cannot be based on speculation or sympathy on your part.

EFFECT OF INSTRUCTIONS AS TO DAMAGES

The fact that the Court has instructed you as to the proper measure of damages should not be considered by you as intimating any view of the Court as to which side of this litigation is entitled to receive a verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of plaintiff from a preponderance of the evidence in the case.

EVIDENCE--DIRECT AND CIRCUMSTANTIAL

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

CREDIBILITY OF WITNESSES

Now in saying that you must consider all the evidence does not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe any witness you should ask yourself a few questions: did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the

opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the question clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

IMPEACHMENT AND INCONSISTENT STATEMENTS

You should also ask yourself whether there was evidence tending to prove that the witness testified concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

STIPULATIONS USED AS EVIDENCE

During the trial of this case, a stipulation has been entered into between the attorneys. Such stipulation consisted of the testimony that would have been offered by a witness if the witness had testified from the witness stand. This stipulation is entitled to the same consideration and, insofar as possible, is to be weighed by the Jury in the same way as if the witness had testified.

DEPOSITIONS USED AS EVIDENCE

During the trial of this case, certain testimony has been read to you by way of deposition. The testimony of a witness who--for some reason--cannot be present to testify from the witness stand is usually presented in writing under oath in the form of a deposition. Such testimony is entitled to the same consideration and, in so far as possible, is to be judged as to credibility and weighed and otherwise considered by the jury in the same way as if the witness had been present and had given, from the witness stand, the testimony read to you from the deposition.

ARGUMENTS AND STATEMENTS OF COUNSEL ARE NOT EVIDENCE

You are instructed that the arguments and statements of counsel are not evidence in the case.

The evidence consists of the sworn testimony of the witnesses, exhibits, facts stipulated, and all pertinent presumptions stated in these instructions.

You are to consider only the evidence in the case. However, in your consideration of the evidence, you are not limited to only the statements of the witnesses. On the contrary, you are permitted to draw-- from the facts which you find have been proved -- such reasonable inferences as seem justified in the light of your experience.

CONCLUDING INSTRUCTION

In order to return a verdict, each juror must agree thereto.

As jurors you have a duty to consult with one another and to deliberate with a view toward reaching an agreement, provided agreement can be reached without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.

In the course of deliberations, you, as jurors, should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. However, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of a verdict.

CLOSING

You are the judges of the facts, of the weight of the evidence, and of the credibility of the witnesses. In determining such weight or credit, you may consider the interest (if any) which a witness may have in the result of the trial, the relation of the witness to the parties, the bias or prejudice (if any has been apparent) the candor -- fairness -- intelligence and demeanor of the witness, the ability of the witness to remember and relate past occurrences, means of observation, and opportunity of knowing the matters about which the witness has testified. From all the facts and

circumstances appearing in evidence and coming to your observation during the trial, and aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment or prejudice enter into your deliberations; but you should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these instructions.

These instructions contain all the law -- whether statutory or otherwise -- to be applied by you in this case and the rules by which you are to weigh the evidence and determine the facts in issue. You will not use any method of chance in arriving at a verdict, but base it on the judgment of each juror concurring therein.

The Court has made rulings in the conduct of the trial and the admission of evidence. In so doing, the Court has not expressed -- nor intimated in any way -- the weight or credit to be given any evidence or testimony admitted during the trial, nor indicated in any way the conclusions to be reached by you in this case. When the Court has sustained an objection to a question, the jury should disregard the question, draw no inference from the wording of it, nor speculate as to what the witness would have said if permitted to answer.

After you have retired to consider your verdict, select one of your number as foreman or forewoman and enter upon your deliberations. Your verdict must be unanimous. After you have reached a verdict, your foreman or forewoman alone will sign it; and you will -- as a body -- return with it into Court. Verdict forms will be furnished for your consideration and use.

If, during your deliberations, it becomes necessary to communicate with the Court, you may send a note by the marshal. Bear in mind that you are not to reveal to the Court -- or any person -- how the jury stands -- numerically or otherwise -- until you have reached your verdict.

The marshal will come forward to be sworn.

\s\ H. Dale Cook
H. DALE COOK
UNITED STATES DISTRICT JUDGE

Date: Jan. 30, 1995

THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS	)	FILED
	)	IN OPEN COURT
	)	JAN 30, 1995
VS.	)	NO. 91-C-715-C
	)	
DENNY'S, INC.	)	

VERDICT FORM I

Plaintiff's Claim
Failure to promote Based on Race Discrimination

(*Your answers to each of the following questions must be unanimous.*)

1. Do you find from the preponderance of the evidence that plaintiff Ronald Thomas has established each essential alement of his prima facie case of failure to promote based on race discrimination as defined in these instructions?

_____ Yes _____ No

If you have answered Question No. 1 "Yes," then proceed to answer the following question. If you answered Question No. 1 "No," then your deliberations are completed as to the claim in Verdict Form I and you will proceed to determine plaintiff's claim of retaliation as set forth in Verdict Form II.

2. Do you find from the preponderance of the evidence that Denny's stated a ligitimate nondiscriminatory reason for not promoting Ronald Thomas?

_____ Yes _____ No

If you have answered Question No. 2 "Yes," then proceed to answer the following question. If you answered Question No. 2 "No," then you need not answer Question 3, and you should proceed to determine Question No. 4.

3. Do you find from the preponderance of the evidence that the reasons stated by Denny's for not promoting Ronald Thomas into management were a pretext for intentional race discrimination?

_____ Yes _____ No

If you have answered Question No. 3 "Yes," then you should proceed to answer the following question. If you answer Question No. 3 "No," then your deliverations are completed as to the claim in Verdict Form I. You will proceed to determine plaintiff's claim of retaliation as set forth in Verdict Form II.

4. Please list the first date that you find Denny's unlawfully denied plaintiff a promotion to management based on his race, then list all subsequent dates, if any, in which Denny's denied plaintiff a promotion to management based on his race.

Date(s)

If the date or dates you listed above are prior to September 12, 1989, then your deliverations are concluded as to the claims in Verdict Form I. You will proceed to determine plaintiff's claim of retaliation as set forth in Verdict Form II. If the date or dates listed above occurred after or prior to and extending after September 12, 1989, then you should proceed to answer the following question.

5. What is the sum of back wages that you find by a preponderance of the evidence and as defined by these instructions, which will compensate the plaintiff for the injury that he sustained as a result of failure to promote based on race discrimination?

$ _____

Any award of back wages cannot predate the statutory limitation period of September 12, 1989, as set forth in these instructions.

6. Do you find that the plaintiff Ronald Thomas has sustained damages in the form of mental or emotional anguish, embarrassment or humiliation as a result of failure to promote based on race discrimination?

_____ Yes _____ No

The amount of such damages, if any? $ _____

(The foreperson should sign and date the Form of Verdict.)

/s/ Deborah R. Ullom-Young
Forperson

1-30-95
Date

THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD K. THOMAS	)	FILED
	)	IN OPEN COURT
	)	JAN 30, 1995
VS.	)	NO. 91-C-715-C
	)	
DENNY'S, INC.	)	

VERDICT FORM II

Plaintiff's Claim of
Retaliation by Failure to Promote

(*Your answers to each of the following questions must be unanimous.*)

1. Do you find from the preponderance of the evidence that plaintiff Ronald Thomas has established each essential element of his prima facie case of retaliation by failure to promote as defined in these instructions?

_____ Yes _____ No

If you have answered Question No. 1 "Yes," then proceed to answer the following question. If you answered Question No. 1 "No," then your deliberations are completed.

2. Do you find from the preponderance of the evidence that Denny's stated a ligitimate nonretaliatory reason for not promoting Ronald Thomas after plaintiff filed a claim of race discrimination?

_____ Yes _____ No

If you have answered Question No. 2 "Yes," then proceed to answer the following question. If you answered Question No. 2 "No," then you need not answer Question 3, and you should proceed to determine Question No. 4.

3. Do you find from the preponderance of the evidence that the reason(s) stated by Denny's for not promoting Ronald Thomas into

management after plaintiff filed a claim of race discrimination was pretextual?

_____ Yes _____ No

If you have answered Question No. 3 "Yes," then you should proceed to answer the following question. If you answer Question No. 3 "No," then your deliberations are completed.

4. Please list the first date that you find Denny's unlawfully retaliated against plaintiff by its failure to promote plaintiff to management based on plaintiff filing a claim of race discrimination, then list all subsequent dates, if any, in which Denny's denied plaintiff a promotion to management based on plaintiff having filed the claim.

Date(s)

If the date or dates you listed above are prior to September 12, 1989, then your deliberations are concluded. If the date or dates listed above occurred after or prior to and extending after September 12, 1989, then you should proceed to answer the following question.

5. What is the sum of back wages that you find by a preponderance of the evidence and as defined by these instructions, which will compensate the plaintiff for the injury that he sustained?

$ _____

Any award of back wages cannot predate the statutory limiation period of September 12, 1989, as set forth in these instructions.

6. Do you find that the plaintiff Ronald Thomas has sustained damages in the form of mental or emotional anguish, embarrassment or humiliation based on Denny's retaliation against plaintiff for filing a claim of race discrimination?

_____ Yes _____ No

The amount of such damages, if any? $ _____

(The foreperson should sign and date the Form of Verdict.)

/s/ Deborah R. Ullom-Young _____ 1-30-95

Forperson Date

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONALD K. THOMAS,

Plaintiff-Appellant,

v.

DENNY'S, INC., a California corporation,

Defendant-Appellee.

No. 95-5146

ORDER

Filed August 27, 1997

Before **SEYMOUR**, Chief Judge, **PORFILIO** and **EBEL**, Circuit Judges.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R.App. P.35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc, so the suggestion for rehearing en banc is also denied.

Further, the panel has agreed that each party shall bear its own appellate costs.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /s/
Deputy Clerk

which is the law, is fine, but the cumulative effect of repetitively saying it or something very similar to that is prejudicial.

THE COURT: Bring it up when you see it.

MS. COLBERT: I'm sorry, what line are you talking about?

MR. BLEDSOE: The last line on page 20. "As you consider this evidence," that sentence, and it goes over on to page 21.

THE COURT: What he's saying is that's correct, but it's also in other instructions further through here and that he believes it shouldn't be stated as often.

MR. BLEDSOE: That's correct.

THE COURT: Show me when you get to it.

Qualified Applicant.

MR. BLEDSOE: Qualified Applicant, we've got some strong reservations and objections to this instruction, Your Honor, and it's based on a very recent Tenth Circuit case which we talked about in relation to another issue the other day, Kenworthy v. Conoco, 979 F.2d.

THE COURT: That's the one you cited that held different than you said.

MR. BLEDSOE: Well, I didn't think it held different. Seemed awful close to me.

THE COURT: Okay.

MR. BLEDSOE: 979 F.2d 1462.

THE COURT: Kenworthy? Is that what you said?

MR. BLEDSOE: Yes, sir. And particularly at page 1470. It's a Tenth Circuit 1992 case.

THE COURT: Page what?

MR. BLEDSOE: 1470.

THE COURT: And what do you say it says?

MR. BLEDSOE: It says what, in the terms of the McDonnell-Douglas type prima facie articulation pretext analysis, what qualified applicant means. And this Qualified Defined relates back to the instruction on page --

THE COURT: What about the instruction is wrong?

MR. BLEDSOE: I don't believe it is the law, Your Honor.

THE COURT: What do you say the law is?

MR. BLEDSOE: The law is based on the Kenworthy case I believe the instruction should read as follows: "To meet his initial burden, the plaintiff must present some credible evidence that he possessed the objective qualifications for the position or positions for which he applied. This burden is not onerous and may be presented through his own testimony and the testimony of others, even when disputed by the defendant employer." That is what -- that's almost direct language out of Kenworthy.

THE COURT: That wasn't an instruction in that case.

getting on the stand and saying, "I didn't have the skills."
And that's what the rule is, that's what you're saying.
MR. BLEDSOE: Well, we have this four-part test that we have to present.
THE COURT: I know.
MR. BLEDSOE: -- in terms of a prima facie case, and one of the tests is qualified, okay, and Judge Seymour in Kenworthy is trying to explain what that means in the context of making a prima facie case, okay? This definition of "qualified" seems to me to place a much higher burden on the plaintiff in making --
THE COURT: Give me the words you say should be used.
MR. BLEDSOE: The words are, "The plaintiff must present some credible evidence that he possessed the objective qualifications for the position for which he applied." And then in line with the language of Kenworthy, which perhaps is duplicitous. "The burden is not onerous and may be presented through his own testimony and the testimony of others" --
THE COURT: It just can't be the law. That just can't be the law.
MR. BLEDSOE: I just ask the Court to look at Kenworthy.
THE COURT: Well, the reason I say that is suppose they don't believe it? All you're saying is they've got to

a promotion for you. I am duty-bound to hire the best candidate that I can to help manage my company and at any time that I am hiring, there might be a better candidate than you. I told you from the beginning that I would play straight with you and hope you view this feedback as helpful. I realize that you are disappointed but hope you can take this constructively and act upon the recommendations."

Q. You provided this to Mr. Thomas?

A. Yes, I did.

Q. Do you know if he ever enrolled in any business courses, college courses?

A. To my knowledge he did not.

Q. You had indicated earlier that you conducted interviews for managers. Do you remember the date of those interviews?

A. The first time was October 13th.

Q. What year?

A. 1986.

Q. And you did hire some other -- you did hire some other unit promotables into management while you were district leader, did you not?

A. Yes, I did.

Q. Do you remember a Diana Newhouse?

A. Yes.

Q. Did you hire her into the MIT program?

A. Yes.

Q. Do you know Mrs. Newhouse's background, why you hired her?

A. Yes. She was either a college student or a college graduate. She had many years with the company as a waitress and as a waitress trainer.

Q. Do you know if she completed the UPP, the unit promotable packet?

A. Yes, she did.

Q. How do you know that?

A. Because I signed off on it and I remember going through it with her.

Q. Do you remember a Shoaib Ahmed?

A. Yes.

Q. Did you promote him into the unit promotable program?

A. Yes.

Q. And what can you tell the jury about Mr. Shoaib Ahmed's background?

A. He had experience working in his father's import/export business, and I believe he had a degree in business from Karachi University.

Q. Do you know whether he completed the UPP program?

A. Yes, he did.

Q. What about a Dava Stark?

A. Dava Stark.

Q. Dava Stark?

Q. What is your age?

A. I'm 30.

Q. And when did you come to this country?

A 1984.

Q.Tell us, please, a little bit about your educational background.

A. I have a bachelor's degree in marketing from back home. Then I'm an aircraft technician from Spartan School of Aeronautics.

Q. Tell us a little bit about the degree you obtained back home, sir, and what its equivalency would be here in the United States.

A. In order to get a bachelor's degree in America, I have to have 33 major hours to change it from -- to have a degree from America.

Q. Does that mean you would need 33 more --

A. Credit hours, yeah.

Q. Sir, did there come a point in time when you began a career at Denny's restaurants?

A. 1985.

Q. How did that come about?

A. As a dishwasher?

Q. Yes. Why did you decide to do that?

A. As a part-time job with my school.

Q. And during what?

the question to you again. Did you in 1984 graduate from Karachi University with a degree in business?

A. Yeah, that's true.

Q. And then in 1985 you went to Rogers State College, did you not?

A. Yes, sir.

Q. Now, when did you start working for Denny's?

A. 1985, March 23rd? I don't know, something like that.

Q. Well, they told you it was important to get some college degrees there if you wanted to be promoted, didn't they?

A. That's true.

Q. And that's the reason you went, isn't it?

A. That's true.

Q. Debbie Reynolds counseled with you, did she not, the district leader?

A. Yeah.

Q. And she told you it would be helpful if you went to get some college courses. And will you say yes loud enough so we can hear you?

A. Oh, I'm sorry, yeah, sure.

Q. And then you went to take these college courses at the suggestion of Debra Reynolds, the district leader, in order to help yourself get into management at Denny's.

A. That's true. She also mentioned it to me to read certain books.

A. Yes.
Q. Did you promote her into the unit promotable program?
A. Yes.
Q. What can you tell the jury about her background?
A. She was a continuing college student at Springfield. She had been with the company for several years as a server and as a server trainer.
Q. Did she complete the UPP program?
A. Yes.
Q. In your opinion were these candidates more qualified than Mr. Thomas?
A. Yes.
Q. Is that why you promoted them at that time?
A. Yes.
Q. Was Mr. Thomas's race ever a factor in any of your decisions?
A. No.
MS. COLBERT: Pass the witness.
MR. STIDHAM: Your Honor, I'm trying to assemble my notes on this witness. I wonder if this would be an appropriate time for a break.
THE COURT: Do you need it?
MR. STIDHAM: Yes, sir.
THE COURT: All right. We'll take a 15-minute recess. Remember the admonition.

Q. I'll represent to you Mr. Thomas has testified that's his effort to complete the promotable program. Do you see that? Do you see the lack of completeness?

A. I see -- this is really not telling me a whole lot.

Q. Well, do you see where -- do you see where there are assignments that were never done, never signed off on?

A. Yes, sir. And I also see lack of management.

Q. How can you say that, Ms. Johnson, by looking at that document?

A. I don't see any notes from managers here.

Q. All right.

A. Or from -- it just really doesn't tell me a whole lot.

Q. Well, take that as being Mr. Thomas's effort that he testified to --

MR. STIDHAM: Objection to argument, sir, as to effort.

THE COURT: Overruled.

Q. (By Mr. Hagedorn) Now, are you saying that that person who did that pamphlet completed even half of it?

A. I really couldn't say either way, sir.

Q. Now, are you saying you worked with the unit promotable packet? Is it basically the same?

A. Yes, pretty much.

Q. You're familiar with that document.

A. Uh-huh.

with him that you never had with Mr. Thomas; isn't that correct?

A. That's true.

Q. All right. And with Mr. Hiroshek and the others, you had a chance to observe them; isn't that correct?

A. Yes. George and Tom were both cooks when I left, so I was not part of their training.

Q. So the comparison that you're about to make is from working with people very closely and helping them into the program vs. Mr. Thomas being over at 11th and Sheridan and you merely recommending him; isn't that correct?

MR. STIDHAM: Objection to argument.

THE COURT: Overruled.

Q. (By Mr. Hagedorn) Isn't that correct?

A. That's true.

MR. HAGEDORN: I object.

THE COURT: Sustained.

MR. STIDHAM: Thank you, Your Honor.

DIRECT EXAMINATION, CONTINUED

BY MR. STIDHAM:

Q. How long did Mr. Thomas run your store in 1987?

MR. HAGEDORN: To which I object to the form of that question, Your Honor.

THE COURT: Overruled.

THE WITNESS: I used Ronnie as a unit aide for

confirmer to you saying that if these certain cost figures and other figures did not -- wee unacceptable, if it didn't improve, you were subject to termination?

A. Well, that's pretty typical, especially if there were some problems in different areas, to receive a conversation confirmer, yes.

Q. My question is, do you remember this?

A. No.

MR. HAGEDORN: May I approach the witness, Your Honor?

Q. I've handed you a document, Ms. Johnson, and I want you to read it and read it privately if you will. And after you've read it, tell us whether or not that refreshes your memory as to my question.

A. It was given to me and I signed it. However, it doesn't refresh my memory as to dates or anything except for the top on here, January 20th, '89. It was given to me and I signed it, yes.

Q. Did you like Mr. Rapier?

A. We tolerated, the same as any boss. I really had nothing against him. I didn't --

Q.Did you know that Mr. Rapier gave Mr. Thomas a promotable packet?

A. No, I didn't.

Did you know that Mr. Thomas did not work on that packet?

MR. STIDHAM: I believe that would be argument.

THE WITNESS: I don't know.

MR. HAGEDORN: I'll rephrase the question.

Q. (By Mr. Hagedorn) The question to you is, Mr. Rapier attempted to get Mr. Thomas into management; are you aware of that?

A. No, I'm not.

Q. Would that be important for you to know, what the efforts of others were towards Mr. Thomas and his attempts to get into management?

A. Would that be important to me? I would assume that if they were trying to get him into management, they would tell me, yes.

Q. But, for example, if Mr. Rapier tried to work with Mr. Thomas to get him into management and Mr. Thomas showed very little effort, would that influence your opinion about Mr. Thomas at all?

A. If I had known. If they would have said something to me.

Q. Well, it's established in this court, ma'am, as a fact that Mr. Rapier tried to work with Mr. Thomas to get into management and Mr. Thomas refused. That would have some influence on your opinions that you gave, wouldn't it?

A. But I don't know that.

Q. Just assume that it's true. And, assuming that it's true, would that have some influence over your opinion?

A. My opinion as to whether Ronnie should have gone into management?

Q. Yes, let's just take that question first.

A. No, that would not have changed my opinion.

Q. In fact, nothing would change your opinion, would it?

A. No, Ronnie --

Q. Listen to my question. No fact about the history of Mr. Thomas through efforts to get into management, good or bad, would affect your opinion, would it?

A. Well, it would have affected my opinion, yes.

Q. Okay. So my question to you is, assume, then, that Mr. Thomas was given a packet by Mr. Smith, and he failed to complete it. Would that have any effect on your opinion?

A. Had I known it back then, it may have. I don't know.

Q. Mr. Smith was a fair man, wasn't he?

A. Yes, he was.

Q. He wouldn't do anything against Mr. Thomas at all, would he?

A. don't think so.

Q.Did you not tell me before you knew he wouldn't?

A. No, I don't think he would.

Q. So, I'd like you to get the exhibit before you, No. 7.

A. Yes.

Q. Do you see it is Joe Smith, the top of the page?

A. Uh-huh.

Q. As such did you have to determine whether or not persons that were employed by Denny's were unit promotables?
A. I had some individuals that worked for me that I did determine and present to the district leader.
Q. About how many were there?
A. There were two that I presented that actually, you know, went into the management program.
Q. And did you have the same opportunity to determine the skills of Mr. Thomas as related to the unit promotable program?
A. I feel like I did.
MR. STIDHAM: Your Honor, that is the foundation that question.
MR. HAGEDORN: May I ask qualifying questions?
THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. HAGEDORN:

Q. The two individuals you recommended was a Mr. Sam Eloweesh -- Elsoueissi, I'm sorry.
A. Right, that's correct.
Q. And a Mr. Jeff Bell.
A. That's correct.
Q. And you helped both of those people complete the unit promotable program.
A. That's correct.

A . Yes, they would be.
Q. Now, you told me that you had Sam Elsoueissi and Jeff Bell and they went through their packet and you recommended them.
A. That's correct.
Q.Would you have recommended Mr. Ronnie Thomas if he had given the effort that you now see before you in the preparatory management program in Exhibit 7?
MR. STIDHAM: We object to the argumentative term "efforts."
MR. HAGEDORN: I'll rephrase it.
Q. (By Mr. Hagedorn) Based on what Mr. Thomas did in working with the program,would you have recommended him for a management position?
A. No.
Q. You said that the packet that you had when you were there was somewhat different?
A. As I recall, it was different, yes.
Q. It was called a UPP.
A. Correct.
Q. Mr. Thomas ever say to you he was given the UPP package to work on?
A. No.
Q. Did you talk with Mr. Max Wetzel at any time about Mr. Thomas?

Q. And for how many years?
A. Two.
Q. During that program did you learn about being a manager?
A. Yes.
Q. Learn about the responsibilities of managing a restaurant?
A. Yes.
Q. Learn about budgets?
A. Yes.
Q. Learn how to prepare food?
A. Yes.
Q. Learn about the various job codes that are in restaurants?
A. Yes.
Q. The various positions that are typical in the restaurant industry?
A. Yes.
Q. Learn how to perform those different duties?
A. Yes.
Q. It's a very thorough program in your opinion?
A. Very thorough
Q. Did you learn about interviewing?
A. Yes.
Q. Learn how to interview potential candidates for employment?

A. Yes.
Q. Learn about inventory?
A. Yes.
Q. Learned how to close out at the end of a shift?
A. Yes.
Q. Learn how to pull drawers at the cash register and do accounting and that type of thing?
A. Yes.
Q. Approximately how many people were in this course at Vo-Tech?
A. About 25.
Q. And did Vo-Tech have an annual competition for students who had participated in that program?
A. Yes, they had one once a year.
Q. Did you participate in that?
A. Yes, I did.
Q. And how well did you do?
A. I won the -- our campus, I won first place.
Q. So you were number one in this city in that program that year.
A. Right.
Q. Did you go on to compete in another competition?
A. Yes. The winners of the local went on to state and I placed fifth in the state competition.
Q. Did that experience at Vo-Tech, those two year that you

were in that program where you went three hours a day, Monday through Friday, did that prepare you to perform your duties better at Denny's?

A. Oh, yes.

Q. And prepared you to be a manager at Denny's?

A. Yes.

Q. Why did you enroll in the program at Vo-Tech?

A. Because I knew what I wanted to do later in life.

Q. And what did you want to do?

A. I wanted to be a Denny's manager.

Q. Do you currently serve on an advisory committee at Vo-Tech?

A. Yes, I do.

Q. What do you do in that position?

A. Once a month I go in with the instructor -- my instructor, him and two other ladies, and we sit down and discuss what's best for the students from business point of views.

Q. Getting into management at Denny's is not an easy task, is it?

A. No, it's not.

Q. You started in 1981 and was not promoted until some ten years later; isn't that true?

A. Yes, it is.

Q. Did you express your desires to be manager throughout

that period?
A. Yes, I did.
Q. Did you work hard to become a promotable candidate?
A. Very hard.
Q. What did you do?
A. I did all kinds -- I trained cooks, I trained 06s.
Q. What is 06s?
A. It's a service assistant. I even trained MITs, I trained approximately four MITs.
Q. And what are MITs?
A. Managers-in-training. Also I did some little projects, like we did a skit that the DL had us do throughout the district. Four girls and I, we -- and two managers went around doing skits for all the stores on how good service would be, how bad service would be. Also, I did a class with the trainers that I showed all the work materials that comes to being a cooks' trainer. I had to show them real thoroughly how to go through all the training materials. Also, I went out on my own time, did a lot of asking the managers, show me this, show me this, just to enhance my abilities.
Q. So you took an initiative.
A. Yes, I did.
Q. You expressed your desire.
A. Yes.
Q. You went to several managers.

A. Yes.
Q. You made it known that you wanted to be promotable.
A. Yes, I did.
Q. You did everything that was asked of you, did you not?
A. Yes, I did.
Q. And even if they had asked you to do something you had previously performed, you did it again, didn't you?
A. Yes.
Q. You really wanted to be a manager.
A. Yes, I did.
Q. What is a certified trainer?
A. A certified trainer is the individual that exceeds the abilities of the other employees, has abilities to train. Also you have to have a little test that the GM goes over with you to make sure you're qualified to train all the other employees.
Q. Did you express a desire to become a certified trainer?
A. Yes, I did.
Q. And did you become a certified trainer?
A. Yes, I did.
Q. In what job codes?
A. 06, 06, and 04.
Q. And tell the jury again, what is 06?
A. Service assistant.
Q. What is 05?

Q. You could have trained those cooks to do those same eight?

A. I could have done it, yes.

Q. Okay. Was there a time that you went to Joplin to train cooks in Joplin?

A. Yes, I went up there one week. They were having some cook problems, so they sent me down there to try to get their cooks back on the right track.

Q. And how much time did you spend in Joplin?

A. One week.

Q. And was that -- were you successful in getting the cooks --

A. I felt it was, I felt it was. Got their morale and their attitudes right.

Q. Isn't it true that you often times came into the restaurant on your off days when you were trying to become promoted to learn more about the responsibilities of a manager?

A. Yes, I did.

Q. `Isn't it true sometimes you would request overtime?

A. Yes. I take it any time I can get it.

Q. And even when you were serving in the role as a cook, if other employees needed assistance,wasn't it common for you to go and see what you could do to help other employees?

A. Sometimes our dishwasher would get behind, we would be

should not have been promoted, and I let it in solely to show what the policy and procedure of Denny's was as it applied generally to people who were testifying. Okay?

MS. COLBERT: I can ask him the question regarding whether she had favorites and did she not spend time with those individuals?

THE COURT: You could ask him if he observed whether she had special favorites, if he observed whether -- as to special favorites, what she did with regard to that, if anything.

(After the bench conference, proceedings resumed in open court as follows within the hearing of the jury:)

Q. (By Ms. Colbert) Isn't it true that Irene Johnson had favorite employees that she liked?

A. Yes, she did.

Q. And was Mr. Thomas one of her favorites?

A. Yes, he was.

Q. And isn't it common that managers would oftentimes recommend their favorite employees for promotion?

A. Yes.

Q. And with her favorite employees, did she spend extra time with them?

A. Yes, she does.

Q. And what type of things does she do -- did she do?

A. She went out to dinner, go over to their houses, invites

them over to her house.

Q. Mr. Bell, what is the Win/Win '93 contest?

A. It's a contest that Denny's had throughout the whole United States of the store who can best the most profit over last year's and the highest increase of sales over last year, over last year's sales and profit.

Q. And did your restaurant participate?

A. Yes, id did.

Q. Did this contest apply for all restaurants throughout the country, Denny's restaurants?

A. Yes, it did.

Q. And how well did your restaurant do?

A. We won first place.

Q. So you were number one in the entire country?

A.Yes. In our division we were number one. My numbers was better than the other divisions.

Q. Throughout the country.

A. Right.

Q. Do you know what the average employee turnover is at Denny's?

A. Seven employees a month.

Q. And what was yours at your restaurant?

A. Two point one.

MS. COLBERT: Thank you, Mr. Bell.

THE COURT: Anything further of this witness?

Q. And how old were you when you came to this country?
A. Nineteen. I think 19 or 18.
Q. What was your educational background prior to coming to this country?
A. High school and I went to the University of London.
Q. University of --
A. London. I did my degree from there. It's in Pakistan, though.
Q. And then you came to the United States?
A. Yes.
Q. Why did you do that?
A. For further education.
Q. And what education did you pursue when you came to the United States?
A. My bachelor's and master's degree.
Q. Where?
A. Different colleges. First I came to Indiana and Tri-State University.
Q. And then?
A. And then I went to Michigan, Rogers State College, Langston, OSU, NSU.
Q. Any schools you missed? And then did you take a job as a dishwasher at Denny's?
A. Yes.
Q. When was that?

Q. Did you view that as a promotion?
A. Yes
Q. Do you know if it was technically a promotion within Denny's?
A. I would say so.
Q. Was it a position of increased responsibility?
A. Basically they were acting manager.
Q. And how long did you act as acting manager?
A. Probably about half a year, one year.
Q. And the, sir, did you ever get accepted to the MIT program?
A. What do you mean "program"?
Q. Were you ever promoted to manager?
A. Yes.
Q. All right. Who was up for promotion at the same time you were?
A. Me, Ronnie, and Majed.
Q. By Ronnie, you mean Mr. Ronnie Thomas.
A. Yes.
Q. And who was Majed?
A. He was another gentleman from Unit 247.
Q. And, sir, was that during the year 1984?
A. That would be correct.
Q How do you know Mr. Thomas was up for promotion at the same time?

Q. "Once again, let me ask you to just briefly give your educational background.

A. "Okay. I have a bachelor's degree in Bible from Central Bible College in Springfield, Missouri.

Q. "And let me just briefly, then, ask you to give your employment background.

A. "I started at Denny's in roughly '77 as a dishwasher my senior year in high school and moved to cook and worked as a cook while I was going to college. In '81 I graduated from CBC and went to work at the Springfield Children's Home.

"Around two years, two and half years later I went back to work at Denny's as a cook. About a year later I was promoted into management with Denny's and moved to Tulsa. Somewhere around '89 I left Denny's and am now employed at the Burrell Center.

Q. "Where did you go when you left Denny's in Tulsa?

A. "I transferred to Joplin and worked as an assistant in Joplin, Missouri for -- I don't know -- three months, six months, and then transferred to Springfield, Missouri.

Q. "Let me ask you when -- approximately when were you promoted to management at Denny's?

A. "It would have been late '83, early '84. Somewhere in that area.

Q. "Do you know Ronnie Thomas?

A. "Yes, I do.

going on?
A. Ken and I were at the 196 store, which is the Yale Street store, and I believe Ken was in town to do some interviewing for management.And Ken was seated at one of the tables in my restaurant and I joined him and we discussed --
Q. Was anyone else present?
A. No, it was Ken and I. And we were discussing the fact that who, again, were the unit promotables and so on and so forth and I did bring up Ronnie's name.
Q. What did he say?
A. Ken said, "You know, Mr. Thomas has a suit against us."
Q. What did you say in response?
A. I said, "Yes, I had heard that."
Q. And what was the context of that statement again?
MR. HAGEDORN: To which, Your Honor, may I object to that question?
MR. STIDHAM: I'll move on.
Q. (By Mr. Stidham) Directing your attention to 1989, ma'am, did you ever have a conversation with Mr. Herb Rapier about Mr. Thomas in management?
A. Oh, yes. Uh-huh.
Q. Now, during this period of time -- we're talking about from 1983, right now, up to 1989, was there a consistent search for managers at Denny's?
A. Constantly.

at that given time.
Q. And then what was the entry level assistant manager at about 1990, sir?
A. Again, sir, I don't recall.
Q. Was there a range of salary?
A. Yes, sir, there's a range.
Q. And what is the range?
A. I don't recall.
Q. Sir, did you know what they are now?
A. Yes.
MR. HAGEDORN: May I object?
THE COURT: Sustained.
Q. (By Mr. Stidham) Do you recall a discussion with Irene Johnson about Mr. Thomas?
A. No, sir, I don't.
Q. Do you know that you have met Irene Johnson, haven't you?
A. Yes, sir, I have.
Q. And she brought up his name for management and you told her you're aware that he's suing the company, didn't you?
A. No, sir, I never told Irene Johnson that.
Q. You heard her testimony, didn't you?
A. Yes, I did.
Q. And you couldn't possibly have told her that, could you?
A. No, sir, absolutely not.
Q. Why is it you couldn't possibly have told her?

THE COURT: Go ahead.

Q. (By Mr. Stidham) Go ahead.

A. For instance, Debbie would come to my store and ask me who I would have qualified as an employee that could go into the unit promotable program. They wanted to have one or two always in the back in case something happened to a manager that we could promote. And we were always going to have somebody ready for promotion.

That doesn't necessarily mean they were going to get it. But we always would have somebody back in the wings if needed. And at the time I talked to Debbie about my employees at my store, I also brought up Ronnie's name.

Q And what did you say to Ms. Reynolds and what did she say to you?

A. I felt that Ronnie was, again, would be a good candidate for mgmt. And Deb Reynolds said we have a problem with Ronnie Thomas and it's his suit against Denny's.

Q. What year was that?

A. It would have been either late 1986 or very early 1987.

Q. Did you go back to Ms. Reynolds again with Mr. Thomas's name?

A. I don't know at what occasion.

MR. HAGEDORN: To which, Your Honor, may I --

THE WITNESS: I mean I may have. I don't recall.

Q. (By Mr. Stidham) Did you have an interview with Mr.

A. "Absolutely not.

Q. "Did anyone ever tell you to treat Mr. Thomas a certain way because he had filed a charge of discrimination?

A. "No."

MS. COLBERT:And then I passed the witness, and then Mr. Stidham asked the following questions:

CROSS-EXAMINATION BY MR. STIDHAM

READ BY MS. COLBERT:

Q. "Ms. Reynolds, you did tell Irene Johnson that you had a problem with Mr. Thomas, didn't you?

A. (Read by Mr. Hagedorn) "I don't recall that conversation.

Q. "Do you recall telling Ms. Johnson that you had a problem and that problem was his lawsuit?

A. "No, I do not recall that.

Q. "Do you recall telling her that you had a problem and that problem was his claim which had been filed with the Human Rights Commission?

A. "No, I do not recall that.

Q. "Who informed you of the claim?

A. "To my knowledge it was Terry Ginsburg.

Q. "And was that on or about December 1986?

A. "I do not recall when that was.

Q. "And you say your first interview with Mr. Thomas was in October?

A. "No, I do not recall when my first interview with Mr.

program to find other managers?

MR. HAGEDORN: Object to the form of the question.

THE COURT: Overruled.

THE WITNESS: Yes, he did.

Q. (By Mr. Stidham) How did that work?

A. Unit level employees that were promoted were not -- we were not eligible if we had a promotion, but if we hired somebody, for instance, if I were to recommend to Mr. Rapier a gentleman and he was hired, then I would get a bonus.

Q. Did you ever go to Mr. Rapier and express your interest in Mr. Thomas going into management?

A. Yes, I did.

Q. What did he say to you?

A. He said they will never allow Ronnie to become manager.

Q. Why?

A. Because he has a suit against Denny's.

Q. Ma'am, did you ever work with a PMP program?

A. I worked with what I call the unit promotable program. But PMP was, I believe, before my time -- I mean, not before my time, but I had never worked with it.

Q. Did the program you worked with require the support of management?

A. Oh, definitely.

Q. Why?

A. It was crucial to a unit level employee getting into

CROSS-EXAMINATION

BY MR. STIDHAM:

Q. Mr. Rapier, you told Irene Johnson he would never be promoted because of his claim, didn't you?

MR. HAGEDORN: Objection.

THE COURT: Overruled.

A. No, I did not.

Q. (By Mr. Stidham) Would she be lying?

MR. HAGEDORN: Oh, Your Honor, I object to that.

THE COURT: Sustained.

Q. (By Mr. Stidham) You never told her that?

A. I never said any such thing.

Q. And Mr. Rapier, if you gave Mr. Thomas another packet, another program to work on, who would he have worked on that with?

A Mo Kasim. Actually, he wouldn't work on it with anybody. The unit promotable program is basically designed where the employee will work at their own pace.

Q. Aren't they supposed to work with a manager on that, sir?

A. The 101, no. They execute the case scenarios, they read a book, they do a book report, they do that work on their own accord. As far as the follow-up and discussion of case studies, yes, the manager should be involved with that and basically evaluate, you know, the way they answer the questions and what have you.

I would put Ronnie's name to her.
Q. How many times did you go to her?
A. A couple of times, several times.
Q. Did you ever go to Mr. Herb Rapier?
A. Yes.
Q. How many times did you go to him?
A. I don't know how many times exactly. Whenever we needed a manager, I would recommend Ronnie, so I'm not sure of the numbers.
Q. And did you ever go to a Mr. Hassib Darweesh?
A. Yes, when we were short of managers.
Q. Okay. Would this have been at or about January of 1991?
A. That Hassib was DM, yeah.
Q. Who was present when you went to Mr. Darweesh?
A. Me and Sam.
Q. Okay. Who is Sam?
A. Sam Elsoueissi.
Q. Yes.
A. He was my assistant manager then.
Q. And what happened?
A. We were just sitting and we were talking and Ronnie was unit aide at that time for me, and one of the managers, I think -- I believe he was going to be sent to the other store, and I said I'll take Ronnie as a manger, why don't you promote him,and Hassib said,would you promote somebody who

has sued? And we got into a discussion that that's why we have the laws and that was the end of it.

Q. What did Mr. Darweesh say to you?

A. You want me to repeat it?

Q. Yes, what did he say?

MR. HAGEDORN: To which, Your Honor, He's already answered.

THE COURT: Go ahead.

Q. (By Mr. Stidham) What was him complete statement?

A. He said would you promote somebody who has sued.

Q. Sued who?

A. The company.

Q. And what company was that?

A. Denny's.

Q. And then what did you say to him?

A. I -- we got into talking and I told him that's why we have laws in this country because the background that Hassib was from and --

Q. No, I'm just asking what you said to him.

A. That's what I was telling him, I said that's why we have laws in this country, and I told him I would do the same if it happened, and we got into talking, me, Sam, and Hassib, all three.

Q. Could Mr. Elsoueissi hear what you were saying?

A. Oh, yeah.

A. Yes.
Q. (By Mr. Stidham) And you're telling us that again today.
A. True.
Q. Didn't you tell Mo Kasim, sir, that you wouldn't promote somebody who was suing the company?
A. No, no.
Q. Don't you remember Sam Elsoueissi being right there?
A. Sam Elsoueissi been there so many times when I was with Mo Kasim, but I don't -- I never said something like that, no.
Q.Don't you remember Mo Kasim telling you something about having rights in this country.?
A. May I say something about Mo Kasim?
Q. I imagine that's going to draw a question on redirect. Not right now, sir. Sir, do you know what an interview analysis from is?
A. What is an interview analysis form? Am I familiar with it?
Q. Yes.
A. Yes.
Q. What is it?
A. It's a form we use to analyze the interview, to point out the strong points of an employee and the weak points of an employee to determine what kind of development they would need.
Q. Why is that form important at Denny's?

Q. Do you know whether he was looking for a different job before he left Denny's? Did he express that to you at all?

A. Yes. I knew he was looking for a different job before he left Denny's.

MR. HAGEDORN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. STIDHAM:

Q. Mr. Elsoueissi, maybe you don't remember the context of the meeting with Mr. Kasim. Do you remember a meeting with Mr. Kasim and Mr. Hassib Darweesh where Mr. Kasim explained Yes, I would promote someone who sued the company.That's why we have right in this country?

A. No, I don't remember that.

MR. STIDHAM: Nothing further.

REDIRECT EXAMINATION

BY MR. HAGEDORN:

Q. Are you saying that didn't happen either?

A. No, did not happen while I was present.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: Your next witness.

MR. HAGEDORN: Call Mr. Herb Rapier, Your Honor.

HERBERT RAPIER

called as a witness by the defendant, having been first duly sworn, testified as follows:

MR. STIDHAM: Yes, sir.

THE COURT: Sustained.

Q. (By Mr. Hagedorn) Mr. Thomas

A. Yes.

Q. -- this document is what the record shows you completed and didn't complete; do you understand that?

MR. STIDHAM: I object to that as argumentative, sir.

MR. HAGEDORN: I'll rephrase.

Q. (By Mr. Hagedorn) This is your preparatory management program, your efforts that you made in 1985 to get into management, is it not?

MR. STIDHAM: I object to that as very unclear and vague.

THE COURT: Overruled

Q. (By Mr. Hagedorn) Is it not?

A. Can you repeat the question? I'm sorry.

Q. This is your preparatory management program, your effort that you made or didn't make in 1985.

A. No, this is not my total effort as far as getting into management.

Q. Let me rephrase the question. This is your document, the preparatory management program, this is yours what we're looking at.

A. Yes, this is the one I was going through

feel it was necessary for him to go through it again, that these other district leaders have made promises to him, and I basically conveyed that I can only be responsible for my own time an deposition, and this is what I can do for you, if you can do these things for me.

Q. Did he at any time refuse to take the packet or work on the packet?

A. He didn't refuse -- he took the packet with him and he took it and the goals and objectives, but as far as I know, very little if any of the work was completed.

Q. What was the list of things that you gave him? Can you give us examples of those?

A. The goals and objectives?

Q. Yes.

A. As I recall, there was a -- he was to design and implement a detailed cleaning system for the kitchen, establish pars for the freezer and cooler pool, and to design a template for the specific placement of various inserts on the steam tables.

Q.Do you know whether or not any work was ever done on the unit promotable package given to Mr. Thomas

A. It was never given back to me, no.

Q. Now, did you hand to Mr. Thomas this package and list?

looking for an African American to work in 247?

A. No.

Q. See, that's -- you were not aware of anything Mr. Darweesh was doing in looking for people, were you, sir?

A. That's correct.

Q. Were you aware that he made job offers to African Americans while you were there?

A. No.

Q. After looking at Exhibit 74, the unit promotable package, and those exhibits I've given you, do you know of any effort that Mr. Thomas made to help himself get into the unit promotable program?

A. Looking at these exhibits, I'd say no.

Q. Were you misled by Mr. Thomas in his efforts before you first supervised him based on what you see before you?

A. I'd have to answer yes.

Q Did you participate in the company meetings wherein different certifying people were attending and special programs were ongoing with employees at Denny's?

A. We had an overall meeting that I attended. As far as the period of time that I was with the company, I believe there was one certification board that met.

Q. Let me rephrase the question.

A. Did I participate? No, I did not.

Q. Were you aware of meeting that they had for employees.

understanding at all, other than a few tasks that managers did. I didn't feel he had any understanding of what the position of manager meant, what it was all about, what the difficulties are, what the challenges are, what the job really entailed.

I didn't feel that -- again, the lack of eye contact, the lack of response to the questions led me to the opinion that he wasn't someone that presented himself well or would present himself well in the public's eye if there was a problem. I gave him some problems, you know, to ask him how he might solve them, and there was no response. Well, as a manage, you can't do that. As a manger, you have to take the initiative and get in there and get a problem resolved before it gets to be too much of a problem that you can't resolve it, and I just didn't feel that he had a good handle of what the job was all about.

Q. Did you communicate your opinion to Mr. Thomas at any time?

A. I don't remember. I remember communicating that to Joe Smith, but I don't remember a specific time that I talked to Mr. Thomas about that.

Q. And what was it you communicated to Mr. Smith at the time?

A. What I communicated to Mr. Smith was that again after the first discussion that we had, that the interview went the same

A. At that time there was not unit promotable packets but there was some exercises we could have provided to him.
Q. All right. The same that Mr. Malcolm and others had done.
A. Right.
Q. Did you meet with Mr. Thomas again after November 3, 1992?
A. Yes, I have.
Q. And tell us when that meeting occurred.
A. I don't remember the exact date, but I believe it was in December, just a couple of weeks later, a few weeks later after the interview we had. Me, Mr. Thomas, and his general manager at that time, his name was Scott Vanarsdel, we were sitting in that meeting room in his restaurant and I sat down and I gave Mr. Thomas the evaluation of the interview. I told him the positive areas he got and I told him the areas that he needed to improve and I told him once those areas are improved, he could be in management.
Q. What did Mr. Thomas say to you?
A. He got hostile, he used a lot -- a few four-letter words. He called me a liar. He said he doesn't believe me and I'm just doing this to protect myself and the company and he left, he got up and left.
Q. Did he ever ask for anything to be put in writing?
A. Yes.

Q. What did he ask to be put in writing?
A. He told me he would not go through that development program unless I give him a written guarantee that if he goes through the development, he will be in management. We have never given written guarantee to anybody, and that's not the procedure that we follow.
Q. Well, did you talk to Mr. Thomas about the fact that you felt that he could get into the MIT program?
A. Yes, I did.
Q. Did you consider what you stated to him an offer to get into the program:
A. Yes, I told him this is genuine offer. All you have to do, just do a few exercises, develop some skills, and you can be in training. He refused that. He just didn't take it well. He got up and left.
Q. What did you say to him when he got angry? Is it a fair statement he did get angry?
A. Yes, he did.
Q. What did you say to him?
A. What I just mentioned, that this is a genuine offer, that I'm going to try to help him as much as I can to get into the management program.
Q.Did you have any reason why Mr. Thomas, if he completed the development program, could not be in management?
A. No.

his claim of discrimination?

A. It's the same Terry Ginsburg that I spoke to.

Q.And in this memorandum, ma'am, you write that Mr. Thomas has already done several management functions. What were those management functions he had already done?

A. It would be things like taking the food inventory, placing the order, counting the register bank, counting the manager's safe.

Q. He had already acted as a unit aide, hadn't he, ma'am?

A. Yes.

Q. And a unit aide can be a very important stepping stone for a unit promotable?

A. It can be a step, not necessarily very important.

Q. Ma'am, isn't it the single most important stepping stone for a unit promotable?

A. No.

Q. Don't they run the store?

A. They carry the keys for a few hours at a time, generally when it's very slow.

Q. Don't they do everything that a manager does during that period without a manager?

AThey perform tasks and follow managers' directives. They do not make decisions. They do not independently determine what's going to happen in the restaurant.

Q. What do you mean they don't make decisions?

them for consideration, if the person came in, was interviewed, and made an offer of employment, they accept it, then we rewarded the individual that referred the person.

Q. There were no black persons promoted from within at Denny's during any period that you're aware of?

A. You mean within my district or the company?

Q. No, from within the company, unit promotables.

A. I can't answer. The company had 1,300 stores. I don't know what happened outside my district.

Q. No. That you are aware of.

A. That I'm aware of.

Q. Yes.

A. No.

Q. And you're not trying to tell the jury, are you, sir, that Mr. Thomas was not a good trainer?

A. No, he actually was a good trainer, but in a cook's capacity, that is correct.

Q. He was one of the best around, wasn't he?

A. Based on the management, yes, on their input.

Q. He had good communication skills, didn't he?

A. In a cook's capacity, yes.

Q. Now, Mr. Danny Jackson was not promoted, was he?

A He wasn't promoted. He was hired from outside. He went through the MIT program. fter completion, he was promoted to assistant manager.

Remember the admonition of the Court.

(After a brief recess, proceedings resumed as follows:)

THE COURT: You may resume your examination.

Q. (By Mr. Hagedorn) Mr. Lynch, you worked with Dana Jackson, an African American, as a manager, did you not?

A. Yes, sir, I did.

Q. Do you know what his educational background was?

A. I do not.

Q. Do you know whether or not he had degrees from college before he came to work?

A. No, I don't.

Q. When an opening occurred or a district leader asked for candidates, would all of the people be able to recommend their people from the four stores:

A. That's correct.

Q. All you could do was really recommend, right?

A. That's correct.

Q. The hard choice was made by the district leader, was it not?

A. That's correct.

Q. But weren't they also interviewed by the personnel people out of Dallas?

A. For the unit promotable eventually into management, I'm not - -

Q. Do you know Mr. Andy Goodwin?
A. Yes, I do.
Q. And who was he?
A. Mr. Goodwin was a cook for Denny's when I joined the company.
Q. And what is his race?
A. He's Afro American as well.
Q. And did his position ever change from being a cook?
A. Yes, it did. He went into the management program during the time - -
MR. STIDHAM: Objection, Your Honor. Can we approach?
THE COURT: Yes.
(The following proceedings occurred at the bench outside the hearing of the jury:)
MR. STIDHAM: I think she's testifying about someone outside of this district.
MS. COLBERT: This is an African American that Mr. Darweesh also recommended for promotion.
THE COURT: Keep your voice down. If you can establish that - -
MS. COLBERT: That's what I'm getting ready to do. She's getting ready to say - -
THE COURT: That's all right.
(After the bench conference, proceedings resumed in

open court as follows within the hearing of the jury:)

Q.(By Ms. Colbert) With regard to Mr. Andy Goodwin, you said he was promoted into management at Denny's?

A. Yes, he was.

Q.And who was the manager at the time that he was promoted?

A. He was under the direction of Mr. Darweesh as well.

Q. So Mr. Darweesh recommended him for a promotion, too

A. Yes, he did.

Q. And he's African American.

A. Yes.

Q. Do you remember what year that was?

A. I can't recall.

Q. Okay. Do you know a Mr. Tom Taylor?

A. Yes, I do.

Q. And how long have you known Mr. Tom Taylor?

A. I met Mr. Tom Taylor in 1990.

Q. Did you have an interview with Mr. Tom Taylor?

A. I had an interview with Mr. Tom Taylor in 1991.

Q. Is this when you were ready to be promoted into management?

A. When I first met Mr. Taylor?

Q. Uh-huh.

A. No, I was all-star for my unit. We had a banquet and I met Mr. Taylor then in 1990. In 1991 I had an interview with Mr. Tom Taylor.

30, 40 minutes.

Q. Could it have been longer than that, sir?

A. I don't recall the time frame.

Q. What did they ask of you, if you recall?

A. I remember them mentioning something about -- it seems like I remember them mentioning something about the case that had been filed, what had happened --

Q. Well, there wasn't -- excuse me, I don't mean to interrupt you.

A. What had happened with the incident with Dick Clemons. It seems like that kind of pops to my head.

Q. Anything else?

A. Other than that at this time I don't know, sir.

Q. Did they not talk to you about any education goals that you may have?

A. At this time -- I hate to say this but it seems like I read something somewhere that said something about, about some conversations someone had. I don't know.

Q.Well, Denny's had African American managers throughout your career there, did they not?

A. Only promoted from outside.

Q. That's not my question. May I ask it again? They had African American managers throughout your career there, did they not?

A. When you say throughout it, is that continuous?

Q. Yes.
A. There was one in the early part of '80 and there was another in - - there was one in the early part of '84, Mr. Dikeh, then there was another sometime in the frame of '86.
Q. Do you remember Mr. Catejan Dikeh?
A. That was early '80.
Q. And he was an African American.
A. Yes.
Q. Was he a manager or assistant manager?
A. He was a manager.
Q. And you worked under him, didn't you, for a period of time?
A. Yeah, he stands out, Mr. Dikeh kind of stands out because I know he was fired from the company.
MR. HAGEDORN: May I ask the last part of it be stricken, Your Honor.
THE COURT: Sustained.
Q. (By Mr. Hagedorn) Mr. Kenneth Cooper was an African American manager in the early '80s, was he not?
A. Not in this district.
Q. Uh?
A. Not in this district.
Q. Kenneth Cooper was not in the district that you were in?
A.Kenneth Cooper was in the Oklahoma City district. Kevin, Kevin Cooper? I'm sorry.

Q. No, Kenneth Cooper, sir - -

A. Okay. Kenneth Cooper.

Q. - - who was a manager in this district at 196.

A. He was at the district in Oklahoma City.

Q. I'm talking about -- let me rephrase it again. Do you remember an African American manager, Kenneth Cooper, who worked at Store 196 in Tulsa, Oklahoma?

A. He was in a different district.

Q. Are you positive about that, Mr. Thomas?

A.I'm not 100 percent, but I'm pretty sure Kevin Cooper was in another district.

Q. Let me give you the name again sir. Kenneth Cooper.

MR. STIDHAM: Object to argument, sir.

Q. (By Mr. Hagedorn) You're saying Kevin, I'm saying Kenneth. Do we understand each other?

A. Mr. Cooper, I'm referring to Mr. Cooper.

Q. Then there was an Alonzo Batson, was there not?

A. Alonzo Batson itself?

Q. You knew Alonzo Batson, did you not?

A. Alonzo Batson, yeah, I think I trained him.

Q. Do you know that he was an assistant manager and manager at 1310 and 196, an African American.

A. This was before my time.

Q. Well, if he was there from 1973 to 1983 that would be during your time, would it not?

A. '73 to '83? No, I came in '78.
Q. But you were there in 1983, were you not?
A. That is correct.
Q. Then Mr. Tipton came in 1986 and then in 1988 a Dana Jackson, and you knew Mr. Jackson, did you not?
A. Dana Jackson.
Q. Dana Jackson.
A. Yes, I did know Dana Jackson.
Q. An African American who was a manager at Denny's.
A. Yes, he was a manager.
Q. And he was there for a period of time; isn't that correct?
A. Dana Jackson was there roughly about a year.
Q. Are you positive about that?
A. It may be a little more than a year.
Q. Could it have been two to three years?
A. Dana Jackson -- Dana Jackson, that would be sometime in -- if he came in '88, Dana Jackson was there a couple of years.
Q.Now, going back to your meeting with Chauncy Tipton then, did Mr. Tipton talk to you from time to time about Denny's?
A. I'm not following your question.
Q. Did you have more than one conversation with Chauncy Tipton?
A. There was just that meeting with him and Mrs. Johnson.

for the Denny's restaurant? and have him explain that to you?

A. (Read by Mr. Bledsoe) "No, I didn't. I don't think I ever talked to Ronnie directly about - - about that. I vaguely remember that I may have mentioned that he should talk to Joe Smith about management,but I don't remember ever having any real conversations with that.

Q. "Did you ever talk to Joe Smith and get Joe Smith's opinion as to why Ronnie was not in management?

A. "No. I don't remember ever asking Joe why."

Q. "That's all I have."

MR. STIDHAM: And I believe that ends the deposition of Mr. Clement.

THE COURT: Very good. Your next witness.

MR. STIDHAM: Plaintiff would call Shoaib Ahmed.

SHOAIB AHMED

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STIDHAM:

Q. Mr. Ahmed, state your name for the record, please, sir, and spell your last name for the court reporter.

A. My first name is Shoaib, S-h-o-a-i-b as in boy, and my last name is Ahmed.

Q. Mr. Ahmed, where are you from, sir?

A. I'm from Pakistan.

strengths, his leadership abilities, so on and so forth, and I also put down that I thought that Ronnie - - well, some of Ronnie's weaknesses were that he was - - needed maybe to find out more about what a manager was. Maybe reading some books, maybe taking a course if he felt like it. Just pretty general - -

Q. Were those some of the things that you received in the MIT program?

AOne of Ronnie's concerns, which I wrote down for Deb, was the fact that Ronnie was concerned about the administration work. All new managers are concerned about their lack of knowledge in the administration work. I was concerned about it and so I knew where Ronnie was coming from, that he was also concerned. And I think I told Ronnie at the time that this is something that he would learn if he ever got into management, that this would all come forward then.

Q. Ma'am, directing your attention to 1988, do you know a Mr. Ken Agorichas?

A. Yes, I do.

Q. Is that the gentleman seated at the table for Denny's?

A. Yes.

Q. Did you have an occasion to discuss Mr. Thomas's promotion into management with Mr. Agorichas?

A. I mentioned Ronnie to him, yes.

Q.Give us the circumstances. Where were you and what was

A. "I didn't feel it went that well myself.

Q. "Can you describe for me why you felt it didn't go that well?

A. "Ronnie didn't interview well. He was -- he had a -- I don't know,he kept looking at his hands when he was answering the questions and no eye contact. He just didn't interview well.

Q"Did you have that problem with Mr. Thomas when you would talk with him just in the store?

A. "He was a shy person, but I communicated well with him.

Q."So you didn't have any problem communicating with him, right?

A. "No, I didn't, not related to his job, no, sir.

Q. "And as result of that interview, what if any decision was made and who made it?

A. "I assumed that the regional manager or the district manager decided that he didn't want him.

Q. "Well, Mr. Smith, are you saying that based on what you actually remember? You said I assume.

A. "I assume. I didn't make the decision. I don't know what was decided. I just know he didn't get promoted.

Q. "Do you recall whether anything further happened as a result of that interview?

A. "Not really. Not from that interview, no.

Q. "Well, at some point" --

Q."How long after you were a general manager at 247 did Mr. Clemons join you as an assistant manager?

A. "I'm not sure. It was just a short while after I got there. Probably no more than two months later.

Q. "Did Mr. Clemons" --

MR. HAGEDORN: And I think this is a question at line 6, rather than an answer. I think it's misdesignated.

Q."Did Mr. Clemons remain as your assistant manager at 247 at all times you were there? And by all times, I mean until you resigned in '87?

A. "No, he transferred to the Woodland Hills store a few months before I left.

Q. "Who took his place, if you know?

A. "Debbie Culligan was there I'm not sure if she took his place. She was already there, I believe. Maybe Bobby Yee was one of my managers there.

Q. "Bobby Yee?

A. "Yes, sir.

Q. "Mr. Thomas has filed in the federal court, the Northern District of Oklahoma, a claim for racial discrimination against Denny's; are you aware of that?

A. "I am no, yes.

Q. "I want you to think very carefully if you know of any facts that would lead you to believe that you or any person within Denny's during the time you were there discriminated

against Mr. Ronnie Thomas because of his race?

A. "I certainly didn't, and I'm not aware of anyone else that did.

Q. "In that work setting, were there any statements, either direct or indirect, about one's race while you were there?

A. "No. We had a very good relationship with everybody.

Q."And with Mr. Kearney and Mr. Clemons and Ms. Reynolds, was Mr. Thomas's race ever discussed?

A. "No, sir, not that I know of.

Q."Did Mr. Thomas ever in any way suggest to you that he was being discriminated against because of his race?

A. "It was never mentioned to me, no, sir.

Q. "I believe you said that you had learned that sometime he had filed a claim with the Equal Employment Opportunity Commission or in Okla was the Human Rights Commission, but you don't know when you learned that; is that a fair statement?

A. No, I don't know who he even filed it with. I just heard he had a claim against the company, but I'm not sure where I Heard it or if it was just common knowledge or whatever. I don't remember.

Q. "Was the fact that he had filed a claim against Denny's Restaurant in some form ever discussed in any decision or discussion with Mr. Ronnie Thomas where you were present?

A. No. I never discussed it or heard it discussed with

Thomas interfaced on the unit promotable program?

A. "I don't believe so.

Q"At any time did Mr. Snoddy, Mr. Kearney, or Mr. Clemons ever suggest to you that Mr. Thomas was not promotable because of his race?

A. "No, sir."

MR. HAGEDORN: And then we have recross-examination by Mr. Gaskill, Your Honor. And I have, Your Honor, about 20 pages. Do you want to try to finish it today?

THE COURT: Yes, let's go ahead and finish it. Twenty pages? I've got nine.

MR. HAGEDORN: Well, maybe nine. Looks like 20.

THE COURT: Well, those are exhibits, I think.

MR. HAGEDORN: Yeah, I think so.

RECROSS-EXAMINATION BY MR. GASKILL

READ BY MR. HAGEDORN:

Q. "Mr. Smith, I just have a few questions and we will try to get you out of there as soon as we can. Mr. Smith, who would need to sign these employment reviews that Mr. Hagedorn has shown you?

A. "Who would need to sign them?

Q. "Yes, sir. In other words, based on Denny's procedure, as you recall.

A. "Well, the employee that is getting the review has to sign it and the person giving it has to sign it and then the

DEFENDANT'S A-107
TRIAL EXHIBIT 7

Joe M. Smith
Denny's 247
45 N. Sheridan
Tulsa, OK.

Terry Ginsburg:

I was transferred to unit 247 as General Manager 9-14-84. Approx.six months later Ronnie Thomas came to me and asked about getting into management. He said he had talked with several managers before and had interviews with previous district managers, and at the time felt he had been given the run-a-round. I told Ronnie I would follow up on this matter.

From observing Ronnie's performance as a cook since I had been at the unit, I had found him to be trustworthy, dependable, an possess a high degree of technical skills in our food service standards. Onthe basis of these qualifications I arranged an interview for him with our District Manager, Mike Kearney.

I was present for this interview, and from my observation it didn't go well. Ronnie avoided any eye contact with the District Mgr. Instead kept looking around the room or down at the floor while answering questions. Also answers to some questions from the District Mgr. indicated his lack of scope on what a manager's responsibilities are. For instance, his answer to "what do you feel is the first thing a manager should do when arriving in the unit in the morning" was, to change the cash drawer.

After this interview Mr. Kearney scheduled another interview for Ronnie with Bill Snoody, Regional Personel Mgr. I was not present at this interview and was informed later that Ronnie would be sent a Unit Promotable Program.

After receiving the program, Ronnie showed no interest in getting involved or getting started on the program. I discussed this with one of my manager's , Dick Clemons. At this time Dick set this as one of his goals: to get Ronnie started on the program, complete it and have Ronnie in a promotable position. While monitoring their progress for several weeks, I found Ronnie consistently failing to complete assignments., failing to show up for briefings with Mr. Clemons and I on his progress.

From Ronnie there was a general lack of initiative and cooperation needed to complete this program.

At this point, Mr. Clemons felt his efforts in this matter were fruitless, and in agreement with myself and Mike Kearney, decided to discontinue the program at this time. (Approx. 1 or 2/86.)

I was totally aware of Ronnie's interest in becoming a service cordinator, or his availability to work the hours we normally use a service cordinator, form 6pm to 4am. Our conversation about him becoming an MIT. is the only interest he has expressed to me besides working his normal 7am to 3pm shift. Ronnie is doing a very good job as a cook and voluntarily assisting Mgmt. in proficient and produce ordering. Other than this I have seen no interest or concern for any other area of the operation.

Glady's Harris was employed as a waitress at Unit 247 in Feb. 1985.
She was assigned an additional job code 055, Service Cordinator, after the transfer of Mgr. Al Clemmet in June 1986.

Our decision to utilize her as service cordinator was based entirely upon her performance. Since her hire date she had become a leader on her shift, 11pm to 7am, and was willing to take responsibility. She became a certified trainer and had been very active in training and coaching new and existing employees.

Many times the Mgr. getting off at 4am would have her follow up on the completion of duties assigned to cooks and service assistants. She handled these assignments in a professional way and gained the respect of fellow employees. her cooperation to assist the mgmt. team and concern for excellent guest service left no question who to select as service cordinator.

Joe M. Smith
Gen. Mgr.
Denny"s Unit 247

[Signed]

A. "Yes.

Q. "Okay. Now, how often did you all meet?

A."I don't remember the exact number. I know we met at my location a couple of times, maybe twice at the Memorial Drive I remember at least once or twice at the Sheridan location. and that's all I really remember.

Q. "Now, how long would these sessions or these meetings last?

A. "Over an hour, I would say. I knew they were over an Hour. That's all I really remember about them.

Q. "So what exactly would happen at these meetings?

A. "We would do mock interviews, basically mock interviews, and I would be the interviewer. I would ask him questions and he would give the answer. We would go over his answers.

Q. "When you first started working with him, the first session, how would you evaluate his performance or his answers?

A. "Similar to what Mrs. Reynolds said. They were very shallow. Most of his answers were based on the perspective of a cook, rather than the perspective of a manager. A lot of his answers were like that. A lot of his answers were answers that would be the perceived answer of a cook and not the perceived answer of someone in a management position, a very shallow answer, just not a real in-depth answer to the questions.

Q. "What about eye contact or, I mean, just --

A."That was a problem with Ronnie. He didn't communicate well. If he knew you -- again, this is just my opinion. It seems if he knew you, he was very comfortable with you. If he didn't know you and if he was not comfortable in a situation he was in, he became very quiet, very -- he never had a good eye contact whether he knew you or not, just didn't communicate well. He was not a very comfortable person in trying situations, if you will, in a stressful situation such as an interview.

Q. "Did he mumble?

A. "At times, at times.

Q. "Did he seem nervous?

A. "Yes, yes.

Q. "Then you would spend, you said, an hour and a half or two together at each session?

A. "At least an hour that I remember, yes.

Q. "When you first started, the first session when you were working with him, based on the questions you were asking and his responses, if you were in a position to do so, would you have hired him as a manager at that point

A. "In the first meeting?

Q. "Yes.

A. "No, I would not have, no.

Q. "And why?

A. "Again, just very little knowledge of the restaurant industry itself. I mean, he had knowledge of what happened on the line, the 18 feet of space that he worked in that restaurant. He had great knowledge in" --

MR. HAGEDORN: Oh, let me read that back, if I might. Your Honor.

A."I mean he had knowledge of what happened on the line, the 18 feet of space that he worked in that restaurant, he had knowledge in. The rest of the restaurant he had virtually no knowledge in, as far as what happened out front, what a server does, what she should be doing, how to enhance a server's performance or anybody's performance, training issues, motivational issues, how to motivate an employee, what motivates an employee, just no personal, relations experience at all. Again, very poor communication skills. He was a good line cook and everything he said was based on that. He just had no picture knowledge, if you will, of the restaurant industry or of Denny's itself.

Q. "When you were asking him questions, he would respond. Did you have to help him with most of his answers?

A. "Yes, I probably helped him on most of his answers, correct, as far as making it more in depth, making it better answers on most things.

Q. "I know this may be kind of hard to remember, but of the questions you would ask, what percent would you say that you

would end up having to help him answer?

A. "I'd say about 75 percent.

Q. "Okay.

A. "I think it would have to be at least that high or we wouldn't have three, four, five, six session on interviewing Again, I don't totally remember but I know if -- because most of these were done on my time; they weren't done on company time. And I probably wouldn't see the need to do it over and over and over again if his answers were good.

Q. "How was he responding? For example, during the first session, was he frustrated because he couldn't answer the questions or how was he responding to this process?

A. "Well --

Q. "What was his attitude?

A. "He wanted to do it. I mean, he wanted to learn it. He wanted to learn the management part of it.

Q. "Uh-huh.

A. "He was very interested in what he was doing. He seemed to enjoy it. I don't think he seemed -- I think he seemed frustrated at times because he wasn't getting it down, if you will. I think that's about it, really.

Q."Okay. So you may have had, you say, four to six sessions maybe?

A. "Yes. I remember three for sure, but -- I can remember three for sure, but I think there were more than that.

Q. "Let's go to the last session that you can recall, or just go to that period. How would you evaluate him on that point with regard to you asking the questions and his responding?

A. "Very little difference form the first interview, very little.

Q. "On a scale of 1 to 10, 10 being perfect improvement --

A. "Uh-huh.

Q. " -- where would you put him?

A. "Maybe a 3. He seemed more comfortable as far as the nervousness seemed to be gone. But the answers still were very shallow and still needed a lot of help on his answers.

Q. "At that point near the end of these sessions, if you were in a position at that point to hire him as a manager, would you have hired him?

A. "No.

Q. "Why was that?

A. "Again, this was just in my thinking, that I would have to help someone in an interview just to answer a somewhat basic management question, I don't think I'd want to pay the person 25 to 30 thousand dollars a year to run a restaurant. I think there is more people out there that would have a much higher knowledge and are worth -- again, if I was district manager -- that would be worth the money that Denny's is paying them at the time for that position.

Q."Okay. Was this the end of your contact with Mr. Thomas?

MR. STIDHAM: Nothing further.

THE COURT: Anything further?

MR. HAGEDORN: Yes, Your Honor, just briefly.

THE COURT: Sure.

MR. STIDHAM: Oh, Your Honor, excuse me. Before I pass the witness, we would ask the witness be subject to recall after the testimony of Mr. Darweesh. I do not want to pass the witness.

RECROSS-EXAMINATION

BY MR. HAGEDORN:

Q. Do you remember your deposition being taken?

A. Yes, I do.

Q. On the 16th day of August, 1993 at page 139, this question being asked of you and this answer being given Question at line 13:

"Okay. What packet did you say he completed?

"Answer: He completed the unit promotable packet."

A. Yes.

Q. Do you remember that question asked?

A. Yes.

Q. Why would you then say to this jury today you're not sure what he said? Are you trying to mislead this jury?

A. No sir, I'm not.

Q. Isn't it a fact that he told you unequivocally he had completed the unit promotable program?

A. That's correct.

Q. Now, Mr. Lynch, you would recommend a person to management in Denny's who had lied to you and misled you. Is that your testimony today?

A. No, that's not.

Q. Did you not tell me he lied to you, Mr. Thomas had lied to you?

A. I don't -- I'm not saying he lied to me. I don't know.

Q. All right. He said he completed the unit promotable packet; correct?

A. Right. This isn't even a unit promotable packet. This is a PPP packet.

Q. And are you denying that that's the preparatory management program?

A. No, there was a preparatory management program in existence back then, I'm sure.

Q. That's been introduced into evidence as the packet given to Mr. Thomas as a unit promotable to complete before going into management. Do you understand that

A. Yes, yes, I do.

Q. And he did not complete that packet, did he, sir?

A. No, he did not.

Q. Then he lied to you, did he not?

A. That's the assumption, yes.

Q. All right. And you already told me he misled you, did

you not?
A. In completing the packet?
Q. Yes.
A. Yes.
Q.Now, is it your testimony today that you would recommend an employee into management of Denny's while you were working there who had lied to you and misled you?
A. No.
Q. So your opinion has changed today, hasn't it, sir? Based on what you know today you would no recommend that person into management, would you, sir?
A. Based on this, no. Based on his abilities that I worked with, yes.
Q. Well, you have to take both, sir. You can't do one without the other as you sit there today. I want to know if you would today recommend this person for management in Denny's base don what you know.
A. I don't know. I can't give you a yes or a no. I mean this is --
Q. So your opinion has changed as you sit there, has it not?
A. Yes, it has.
Q. Certainly a district leader who has the knowledge that you have, okay, would have to consider these facts, wouldn't it?
A. That's correct.

Taylor were sitting down at a table and we had just a regular interview like we interview everybody else when they're interested in management. We asked him questions and he answered the questions. And toward the end, he got a little hostile and he said he was better than anybody we ever had for the last 15 years and he should have been in my position now.

Q. In your position?

A. Right.

Q. Did he answer all the questions asked of him?

A. Yes.

Q. Then did you form an opinion at that time as to whether or not you would want him into management on November 3, 1993?

A. Yes, I did.

Q. And what was that opinion?

A. That Mr. Thomas got a lot of strong points, he was a strong employee, a good cook, reliable. He got some managerial skills he need to develop before he goes to the training and that was my plan to him.

Q. What things do you think he needed before he could get into the MIT training?

A. The first thing I wanted him to work on is supervising other employees and managing other employees' time. He manages his time well. He supervises himself well. But when it comes to supervising other employees, he was a little shaky in that area. I was planning to give him some exercises and

should not have been promoted, and I let it in solely to show what the policy and procedure of Denny's was as it applied generally to people who were testifying. Okay?

MS. COLBERT: I can ask him the question regarding whether she had favorites and did she not spend time with those individuals?

THE COURT: You could ask him if he observed whether she had special favorites, if he observed whether -- as to special favorites, what she did with regard to that, if anything.

(After the bench conference, proceedings resumed in open court as follows within the hearing of the jury:)

Q. (By Ms. Colbert) Isn't it true that Irene Johnson had favorite employees that she liked?

A. Yes, she did.

Q. And was Mr. Thomas one of her favorites?

A. Yes, he was.

Q. And isn't it common that managers would oftentimes recommend their favorite employees for promotion?

A. Yes.

Q. And with her favorite employees, did she spend extra time with them?

a. Yes, she does.

Q. And what type of things does she do -- did she do?

A. She went out to dinner, go over to their houses, invites

these people's applications right in front of him.
Q. who was the district trainer that had the people right in front of him?
A. Well, actually anybody that was a district trainer. Masood Kasim was a district trainer, John Lynch was a district trainer, Irene Johnson was a district trainer, Jaimie Cullinan was a district trainer, Joe Smith was a district trainer. They was the district trainers, I was the district cook trainer. We was in constant contact.
Q. Well, if they had any education at all beyond -- any college education in business, that's more than you had; isn't that correct?
A. I'm not understanding the question that you're asking.
Q. You did not have one hour of college training.
THE COURT: Mr. Hagedorn, you've been over this. There's no sense in repeating it.
Q. (By Mr. Hagedorn) Let's go to the next subject and it's my last one. Who is Mary Strakoulas?
A. Mary Strakoulas? She was an English teacher.
Q. She tutored you in grammar, did she not?
A. Yes, sir.
Q. She had a book that she gave you which was a grammar book, did she not, and you and she worked from it?
A. The grammar book, I don't think we actually worked from the grammar book, but I do remember seeing the grammar book.

Q. Do you recall a Ms. Paula McFadden?
A. Yes.
Q. She made manager in about 1989.
A. Yes.
Q. How would you compare her?
A. Paula McFadden, she had been with the company a short period of time, two or three years, maybe four years at the most. In 1989 I had been with the company itself for about 11 years then. I was able to observe her because when she was promoted, she came to our store itself and I trained her as a cook.
QDo you recall Mr. Jeff Bell being promoted in about 1990?
A. Yes.
Q. How did your qualifications compare to his?
A. Jeff Bell had been with the company roughly a couple of years less than I had. Jeff Bell was one person that stood out that I felt was just as qualified as myself. I knew there was a number of times when I was up for promotion and Jeff was up, but ultimately Jeff received the promotion and I didn't.
Q. these others you have indicated, do you believe you were more qualified than they were?
A. I believe I was better qualified.
Q. and is that something you were comfortable discussing?
A. No, sir.
Q. Why not?

Appendix J

STARTED 11/13/85

END 5/13/85

PREPARATORY MANAGEMENT PROGRAM

REGION X

PREPARATORY MANAGEMENT PROGRAM

LIST OF ASSIGNMENTS AND TASKS

Contents of this program are to be completed at your own pace and in no particular sequence. However, those items with an asterisk beside them, (*), indicate that for the program to be completed in six months, you should begin working on them promptly.

When you are completing a written assignment, please be thorough. No page limitations have been set to allow for a complete and excellent product. Written assignments should demonstrate your knowledge of spelling, grammar and proper sentence structure. It is preferred that written assignments be typed, however, work that is neatly handwritten will be accepted.

The work that you do in this program will be kept in your personnel file for your District Manager to review. The Regional Personnel Manager will also critique your work prior to, or during, your interview.

UNIT COMMITTEE

* _____ Date completed — A. Serve as chairperson of a committee in your unit (e.g. food cost, sanitation, safety) for three months.

* _____ Date completed — B. As chairperson, select your successor who will assume the duties of the committee chairperson when you have served three months.

* _____ Date completed — C. List the accomplishments of the unit committee while you were serving as the chairperson.

JOB CODE REQUIREMENTS

03/05 Host-Hostess/Server

* 3/1/86 Date completed — A. Train and demonstrate proficiency in this job code.

* _____ Date completed — B. Complete a job code knowledge test with a passing grade of 90%.

* _____ Date completed — C. Design a specifications test for the 03/05 job codes and present at a meeting in your unit

* _____ Date completed — D. Become a certified 03/05 trainer.

* _____ Date completed — E. Train a newly - hired server in your unit.

JOB CODE REQUIREMENTS (continued)

04 Cook

• 3/5/86 (8 YEARS) Date completed	A. Train and demonstrate proficiency in this job code.
* • 3/5/86 Date completed	B. Complete a job code knowledge test with a passing grade of 90%.
* • Date completed	C. Design a specifications test for the 04 job code and present at a meeting in your unit.
• 3/5/86 Date completed	D. Become a certified 04 trainer.
• 3/5/86 Date completed	E. Train a newly hired cook in your unit.

06 Service Assistant

• 3/5/86 Date completed	A. Train and demonstrate proficiency in this job code.
* • Date completed	B. Complete a job code knowledge test with a passing grade of 90%.
* • Date completed	C. Design a specifications test for the 06 job code and present at a meeting in your unit.
• Date completed	D. Become a certified 06 trainer.
• Date completed	E. Train a newly hired service assistant in your unit.

055 Service Coordinator

• Date completed	A. Train and demonstrate proficiency in this job code.
• Date completed	B. Perform the duties of a service coordinator for a minimum of 40 hours/month for three months.

ADMINISTRATION

11/25/86
Date completed

A. Proficient Food Company Inventory
1. Complete at least 4 PFC inventories with your manager present.

11/25/85 11/26/85
Date Date

12/2/85 12/9/85
Date Date

2. Complete a PFC inventory without a manager present. (Manager must check inventory after completion.)

1/13/86
Date

3. Assist in placing the PFC order with a manager present.

1/20/86
Date

1/22/86
Date completed

B. Demonstrate knowledge of weekly payroll procedures by completing timecards, determining labor dollars spent, calculating total hours [redacted] hours and the basic skills of data input into the Norand.

Date completed

C. Assist management in completing a menu mix. Include the basic skills of date input into the Norand.

1/19/86
Date completed

D. Complete a bar inventory with a manager present. (Where applicable)

Date completed

E. Follow up comment card responses, including both positive and negative cards, received within a one-month period.

Date completed

F. Assist your District Manager in a KRA quarterly inspection of your unit. Submit a paper that provides action steps to improve weak areas.

BEST AVAILA

ADMINISTRATION

Sidework/Prep Sheets

_____ Date completed — A. Assist management in re-designing the sidework charts for one job code.

_____ Date completed — B. Re-design the deep cleaning assignments for one job code.

_____ Date completed — C. Assist management in setting up cook prep sheet pars. This is to be done for the semi-annual menu changes.

Interviewing/Hiring

_____ Date completed — A. Participate in discussions with your manager concerning the hiring process. (Include legal/illegal questions)

_____ Date completed — B. Submit a list of questions applicable to interviewing all job code candidates.

_____ Date completed — C. Submit a list of interview questions directed at the different job codes.

_____ Date completed — D. Pre-screen interview at least two candidates from the three major job codes: (03/05, 04 and 06)

_____ Date completed — E. Submit a paper on what you learned from interviewing.

Presentations/Workshops

_____ Date completed — A. Give one presentation at a district workshop.

_____ Date completed — B. Give two presentations at unit meetings. (This does not include job code knowledge tests that were previously assigned.)

_____ Date completed — C. Attend two workshops at the Regional Office, unless excused for geographical reasons.

Miscellaneous

_____ Date completed — A. Complete Case Studies, Level A.

_____ Date completed — B. Complete Case Studies, Level B.

_____ Date completed — C. Read The One Minute Manager. Submit a detailed report on what you learned from the book.

_____ Date completed — D. Write a paper on the subject of building sales in your unit. Describe the good things that your unit does to positively affect the sales growth. Name some negative aspects of your unit that could negatively affect sales. Discuss what your unit could do to increase sales.

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MISCELLANEOUS - continued

_____
Date completed

E. Work in another unit as an OSS on four different shifts. (Preferably weekends). Submit a critique describing what you learned from each visit.

Date/Shift	Day of Week

_____
Date completed

F. Attend Sessions I-IV of Project HOPE. Submit a paper discussing how a manager is to incorporate Project HOPE into his/her management style.

CASE STUDY COMPLETION SHEET

LEVEL A CASE STUDIES

#1 Date completed 11/17/87 Date discussed with manager _____

#2 Date completed 11/17/87 Date discussed with manager _____

#3 Date completed 11/17/87 Date discussed with manager _____

#4 Date completed 11/17/87 Date discussed with manager _____

#5 Date completed 11/17/87 Date discussed with manager _____

#6 Date completed 11/17/87 Date discussed with manager _____

LEVEL B CASE STUDIES

I Date completed _____ Date discussed with manager _____

II Date completed _____ Date discussed with manager _____

III Date completed _____ Date discussed with manager _____

IV Date completed _____ Date discussed with manager _____

V Date completed _____ Date discussed with manager _____

VI Date completed _____ Date discussed with manager _____

VII Date completed _____ Date discussed with manager _____

CASE STUDIES: LEVEL A

The following case studies will enable you to utilize your problem solving abilities. Each case study is an example of a potential real life situation that you, as a Denny's Manager, could encounter. Please read each case study carefully and answer in the space provided after each question. If additional paper is needed, feel free to write on the back of the page. After you complete the case studies, review your answers with either your Unit Manager or District Manager.

1.

You are working a Monday night swing shift as an Assistant Manager. The business volume is slower than usual. Rather than send some staff members home, you decide that this will be a deep cleaning event. As you begin assigning various cleaning tasks to the group, one server in particular, refuses to deep clean the salad refrigerator because she doesn't like kneeling on the floor. List all possible solutions to this problem and your projected outcomes and implications of each solution. Which solution would you pick to solve this problem?

2.

While working the floor one evening, a server approaches you with a problem that concerns an irate guest who insists that she ordered off of the Senior Citizen's menu at a different Denny's two weeks ago. (This guest is obviously under 55 years old) This guest has told the server that unless given a Senior Citizen's dinner, she will never patronize another Denny's. How would you handle this situation?

3.

A trusted server, who has been with Denny's for three years had just told you that your best third shift cook has been stealing food after you leave every night. What would you do?

4A

As an Assistant Manager, you receive a 'phone call one evening at 11:15 p.m. from an irate woman who claims she got food poisoning from your visit last Friday evening and had to go to the doctor. What would you ask her to find out more about the problem?

4B

After you have received all of the information that you need, what would your response be to her and the situation? (Include the following: How you would handle the conversation with this woman; who would you inform; action steps to prevent this from happening again.)

5.

You are working a Tuesday day shift. During lunch hour, the non-smoking section fills up at once. An experienced server has been stationed in non-smoking for the day. You realize that it would be impossible for her to handle all of these tables at once, giving quality service within the timing standards. You approach another server and ask her to help out by taking two small tables in the non-smoking section. When you inform the assigned non-smoking section server about your decision, she gets very angry and proceeds to tell the other waitress to stay out of her section. The guests are looking impatient. How would you handle this situation at that moment? What follow-up action would you take at the shift's end.

6.

The American Red Cross telephones you one Monday evening to inform you that some apartment complex residents, who live by your unit, were made homeless by a fire that afternoon. They want you to accommodate the food vouchers that they want to give these people. What is your response and what is the proper procedure for handling this method of payment?

7.

Two guests are eating lunch in your restaurant. Both guests ordered a Super Bird sandwich and complain to you about the quality of product. You can see that the product was made to Denny's specifications; however, they are complaining about the bread as it doesn't meet their criteria for sourdough French bread. What is your response to this situation?

INSTRUCTIONS FOR CASE STUDIES: LEVEL B

These case studies were designed to present problem situations of a more advanced nature that Denny's managers encounter.

To receive the optimum learning experience from these studies, the participant should keep the following in mind:

1) Do not rush through the case studies. Each case study should take approximately 45 minutes to complete.

2) Your Unit Manager and/or District Manager should discuss each case study with you and initial the Case Study Completion Sheet.

3) Read each case study thoroughly and answer the question (s) that immediately follow.

4) Study the Key Points section on the following pages.

5) Answer the questions on the next pages entitled, Reaction to Situation #_____.

6) Any additional comments or questions that you have can be written on additional sheets of paper.

Hopefully, these case studies will give you an opportunity to think about some of these important issues of restaurant management. In addition, these issues should raise further questions in your mind concerning similar-type of problems, to which you should discuss with your Unit Manager or District Manager.

CONTENTS

I. FOLLOW UP ON POOR PERFORMANCE

II. WORKING WITH EMOTIONAL SITUATIONS

III. HANDLING RESISTANCE TO CHANGE

IV. IMPROVING WORK HABITS

V. ADDRESSING THE TARDY PROBLEM

VI. MAINTAINING IMPROVED PERFORMANCE

VII. DELEGATING RESPONSIBILITY

CASE STUDY #1

Mary is a waitress at your unit and is generally an above average employee. Her customer relations skills are normally above average and she is usually a good team player. Although she handles a lot of customers, you are disturbed by her guest check average. Your unit has a guest check average of $3.25 and Mary's is typically $2.50. On October 3 you had a counseling session with her and it was decided that Mary must immediately use suggestive selling with her customers. For two weeks after that discussion, Mary increased her guest check average to $3.10. However, by the third week, Mary showed an average guest check of $2.50. It is October 30, and you are going to have a follow-up meeting to discuss this situation.

Outline the procedures you might utilize in this follow-up discussion with Mary:

NOW, TURN THE PAGE AND READ THE FOLLOWING KEY POINTS OF UTILIZING EFFECTIVE FOLLOW-UP.

KEY POINTS: FOLLOW-UP ON POOR PERFORMANCE

When an employee has been warned of poor performance it is important to set a follow-up date to (1) see if the performance has improved and to acknowledge the improved performance or to (2) define consequences for no improvement. The key elements that should be involved in a follow-up session include the following:

1. REVIEW PREVIOUS DISCUSSIONS

   The manager should review previous discussions held with the employee and should highlight the main details of the discussion.

2. INDICATE THAT THERE IS INSUFFICIENT IMPROVEMENT

   The manager should let the employee know that there has been inadequate improvement. The goal or level of performance should be outlined for the employee. The employee should be given the opportunity to explain why no improvement has occured.

3. DISCUSS/REVIEW SOLUTIONS

   The manager and employee should discuss solutions to the problem even if they have been previously discussed.

4. IDENTIFY THE CONSEQUENCES FOR LACK OF PERFORMANCE

   Since this is not a first offense, it is important that the employee has a good picture of what will happen if this problem is not resolved.

5. AGREE ON ACTION TO BE TAKEN

   It is critical that the employee is committed to the action that must be taken. This increases the chances for performance improvement.

6. RE-ESTABLISH A FOLLOW-UP DATE

A specific follow-up date to review the performance should be established. If not, the matter will not be taken seriously by the employee.

7. INDICATE CONFIDENCE IN THE EMPLOYEE

Let the employee know that you feel confident in his/her ability to correct the situation. That's one reason why you're trying to help him/her.

NOW, TURN THE PAGE AND COMPLETE THE ASSIGNMENT.

REACTION TO SITUATION #1

1. What is the purpose of the follow-up?

2. Why do we want to set consequences if there is no improvement in performance?

3. How could you express confidence in the employees ability to improve?

4. Review your strategy to the case study. Is there anything you might have done differently? If so, what?

CASE STUDY #2

Ivy is a six month waitress at your unit. She is extremely outgoing and the customers really like her. Her problem, however, is that she tends to fraternize too much with customers, especially during peak periods. This, of course, results in slow service. You encourage your unit employees to be friendly to customers. In fact, you have even mentioned to Ivy that you're glad that she's part of your team and that her customer relations skills are superior. Your unit volume, however, has increased significantly because of new office building construction in your area and new home construction. The other day you told Ivy she would have to increase her speed and suggested she not socialize with customers too much. Her comment to you was, "Well, Mr Smith, you've had no customer complaints on me and you have always encouraged me to treat each customer like a special guest. I'm just doing the best that I can." How might you approach Ivy to discuss this situation? Keep in mind that Ivy is a good performer and she is upset by the fact that on one hand you encourage her to be friendly to customers, but on the other hand she feels you are contradicting yourself.

NOW, TURN THE PAGE AND READ THE FOLLOWING KEY POINTS OF WORKING WITH EMOTIONAL SITUATIONS.

KEY POINTS: WORKING WITH EMOTIONAL SITUATIONS

Nobody likes to face an irate or emotionally upset employee. It becomes even more difficult when the employee is usually a good performer. There are some things that a manager can do to reduce tension and turn a bad experience into a constructive response. They include:

1. MAKE THE DISCUSSION PRIVATE

   Have the discussion in a quiet place, free of distractions. This will allow you to focus on the employee and to give him/her your full attention.

2. LISTEN TO THE EMPLOYEE'S COMMENTS AND RESPOND WITH EMPATHY

   Whatever the controversy, during an emotional situation, it is a good idea for the manager to pick out those ideas where agreement can be reached. Securing even slight agreement initially may go a long way to reducing some of the tension.

3. ENCOURAGE THE EMPLOYEE TO GIVE YOU INFORMATION ABOUT THE PROBLEM

   This will give the manager an opportunity to hear the employees side. The goal of the meeting is to resolve a problem, not to prove the employee is wrong. By listening, the manager could evaluate the ideas of the employee. Also, effective listening will reduce the anger of the employee and the manager. The manager who listens and responds calmly conserves emotional energy that could be directed toward solving the problem.

4. DISCUSS POSSIBLE SOLUTIONS WITH THE EMPLOYEE

   This should be a two way discussion where the manager and the employee agree on appropriate actions to be taken. Solutions to problems are usually not black and white in nature. In most cases the employee and the manager could both come out as winners.

5. SUMMARIZE AND OFFER ENCOURAGEMENT

Whatever the issues and findings, the supervisor should recap the problem and the suggestions for a solution. Any final decision should be discussed, and the employee made to feel a contributor to it.

6. FOLLOW-UP

Let the employee know when improvement has or has not occurred.

TURN THE PAGE AND COMPLETE THE ASSIGNMENT

REACTION TO SITUATION #2

1. Why is it important for a manager to listen when dealing with a situation that could be tense?

2. Why should the employee be encouraged to assist in identifying solutions to problems?

3. Why should employee discussions be held in a private area free of interruptions?

4. Refer to your original plan in handling this situation. Is there anything you might do differently? If so, what?

CASE STUDY #3

The company has changed its menu codes because of new systems that were tested in two regions. As a result of this change, the company will realize an annual savings of 1.5 million dollars. Needless to say, you are already anticipating a negative response from your cooks and waiter/ess.' They have already expressed frustration to you on previous menu item changes and new procedures, and that when they learn the techniques of a new system, another change is made. You know that you might lose some of your employees. In fact, your unit is located in an area that is over saturated with restaurants. Any one of your employees could walk out and have a job within five minutes with your competitors. You have to make this menu code change within two months. What steps might you follow to make this transition?

TURN TO THE NEXT PAGE AND READ THE KEY POINTS ON HANDLING RESISTANCE TO CHANGE

HANDLING RESISTANCE TO CHANGE

Change is inevitable, especially in our industry. That's just a fact of life. Frequently, the manager has little or no control of organizational change. There are several reasons for change; the most common ones usually include the following:

1. Governmental Regulations
2. Changes in the market area
3. Change in organizational philosophy to increase productivity
4. New products/procedures
5. Change to improve or to solve a problem area.

People usually resist change because they fear the unknown and they are comfortable with current ways of doing things. However, a main reason why change is often resisted is because people are not given the reasons for the change and how the change will affect them. Therefore, when a major change does occur, it is important that the manager understands the reasons for the change and how it affects the employee, and that the manager has either individual or group discussions with the employees. Some of the steps that should be considered in discussing a major change include the following:

1. TELL THE EMPLOYEES ABOUT THE CHANGE AND WHY IT WAS NECESSARY

   Let the employee know why the change has occurred and the reasons for the change. Make your reasons as valid as possible as opposed to saying that "management has decided" on the change. If people know the "whys" of a situation, they are less likely to resist change because they will have a better understanding of the situation.

2. EXPLAIN HOW THE CHANGE WILL AFFECT THE EMPLOYEE

   With every change, there are going to be some negatives. Don't deny them, because they probably exist. However, most changes are made because they will have long term positive results without denying any of the negatives.

3. ASK THE EMPLOYEES FOR QUESTIONS AND LISTEN WITH AN OPEN MIND

Be prepared for a variety of reactions, both favorable and unfavorable reactions. Acknowledge the feelings of your employees and be open with them by being frank in your discussion.

4. ASK THE EMPLOYEES FOR THEIR ASSISTANCE IN MAKING THE CHANGE WORK

If the supervisor has created a favorable work environment and if he/she allowed the employees to ventilate their frustrations, the employees will most likely show a willingness to help make the change work.

COMPLETE THE ASSIGNMENT ON THE NEXT PAGE

REACTION TO SITUATION #3

1. Employees should not be told why a change in their work has occurred. It's their job to conform to the rules of the organization. Do you agree or disagree with this statement? Why or why not?

2. When a change is to be instituted, you should completely ignore the negative aspects of the change. By doing this, your employees will give you no resistance. Do you agree? Why or why not?

3. Review your strategy for the case study. Is there something you might have done differently. If so, what?

CASE STUDY #4

Your lead cook has a tendency to be abrupt with the waiter/ess at the pass through. His personal performance is very good. He is cost conscious and understands his job well. However, his sarcasm has created a lot of ill feelings between himself and the waiter/ess. For example, within the last week, you overheard the following:

> A waiter brought back eggs because they were not properly prepared. His comment to the waiter was, "If this isn't over easy I don't know what is."
>
> A relatively new waitress returned an order because it was cold. The cook said, "If you moved a little faster, it would still be hot."
>
> He refused to cook an order because he told the waiter that he could not read his "chicken scratch" writing.

How would you handle this problem. Keep in mind that in all other areas, this is your best cook.

TURN THE PAGE AND READ THE KEY POINTS

KEY POINTS: IMPROVING WORK HABITS

Attempting to improve on a specific work habit is difficult, especially if the employee is exceptional in all other areas. However, if a work habit affects good customer service or a sense of teamwork it will not go away unless it is addressed. Therefore, your goal is not to wipe the employee away, but to let him/her know that an area of his/her performance is having a negative impact on the operations. Some suggested approaches you might want to employ include:

1. LET THE EMPLOYEE KNOW WHAT YOU HAVE OBSERVED

   This involves sitting down with the employee and giving him/her specific and detailed information about the performance problem. Be specific in your language. For example, instead of telling the employee he/she has a "negative" attitude, give specific examples of what the employee is doing.

2. LET THE EMPLOYEE KNOW WHY THE PERFORMANCE PROBLEM CONCERNS YOU

   In other words, tell the employee why and how this problem affects the operations and the impact it has on the operations.

3. GIVE THE EMPLOYEE AN OPPORTUNITY TO DISCUSS HIS PERFORMANCE

   Listen openly to his/her explanations. Ask for reasons. If his reasons seem justified, explain that you will look into the matter. However, remind the employee that this does not excuse poor performance on his/her part.

4. LET THE EMPLOYEE KNOW THE SITUATION MUST BE CHANGED

   Make certain that the employee knows that change must occur and why he has to change. Also, ask for his/her ideas in solving the problem.

REACTION TO SITUATION #4

1. Which of the following statements describes a poor work habit.

____ 1. You don't smile at customers

____ 2. Your attitude is poor

____ 3. You are rude

____ 4. You over portion on the vegetables

____ 5. You did not suggestive sell our new cake

____ 6. You are irresponsible

____ 7. You were late to work by one half hour

NOTE: SEE BELOW FOR CORRECT ANSWERS

2. Why is it important to offer assistance to an employee who has a poor work habit?

3. Review your case study. Are there any other things you might have done differently? If so, what?

ANSWERS TO QUESTION #1
ITEMS NUMBER 1, 4, 5, AND 7 ARE ALL SPECIFIC BECAUSE THEY EXPRESS A SPECIFIC ACTION. THE OTHER STATEMENTS ARE VAGUE AND ARE OPEN TO INTERPRETATION.

CASE STUDY #5

Joe is a service assistant at your unit. He is a part-time student at the local junior college. He has been working for you for one year. With the exception of one or two minor problems, you're pleased with Joe's performance. His plans are to continue his studies at the junior college for two more years as well as to continue to work at Denny's during this period. You're pleased with this arrangement because you know how difficult it is to find long term service assistants. Although you cannot criticize Joe's work, there is one thing that has recently developed that is disturbing to you. Within the last two weeks Joe has been tardy to work by one half hour. This is uncharacteristic of Joe. You have your suspicions that one reason Joe has been tardy is due to his recent life style. He has developed a relationship with a girl from the college and you feel he is staying out very late some nights. Normally, it would be none if your business, but because it is interferring with the job, you feel that you should say something.

How would you approach this problem with Joe?

NOW, TURN THE PAGE AND READ THE KEY POINTS

KEY POINTS: ADDRESSING A TARDY PROBLEM

Generally speaking, tardiness is usually a less difficult problem to deal with because there aren't any "gray" areas to be considered. It simply involves recording the problem (when it happened and the amount of time involved). However, to facilitate good employee relations, an approach to consider might include the following key points:

1. DESCRIBE THE TARDINESS PROBLEM

   This would include when it happened and how late the person was.

2. ASK REASONS FOR THE TARDINESS

   Let the employee know you are concerned. One way to do this is to find out why this has occurred. Another reason for asking the employee why this problem occurred is to be in a position to resolve it.

3. LISTEN TO THE EMPLOYEES REASONS

   Don't shrug off all reasons as being unacceptable. There might be extenuating circumstances that caused the problem, i.e. an accident on the freeway that held traffic up for one hour.

4. HAVE THE EMPLOYEE COME UP WITH POSSIBLE SOLUTIONS

   Again, problems that are self resolved usually have more meaning for the person. You could just tell the person to be to work on time or else, but this won't have the same impact as having the person resolve the problem.

5. AGREE ON SPECIFIC ACTION

   Make certain that you and the employee have agreed on how this will be resolved. Also, be sure to check back with the employee to follow-up on the specific action.

COMPLETE THE REVIEW ON THE NEXT SHEET

REACTION TO SITUATION #5

1. If any employee is tardy to work they should immediately be reprimanded and told that future incidents will be grounds for termination. How do you feel about this approach? Why?

2. Review your original answer to the case study. Are there any things you might have done differently? If so, what?

CASE STUDY #6

On March 3 you had a counseling session with Frank, one of your waiters. You wrote a counseling review stating that his performance had declined. More specifically, Frank was not adhering to our policy of checking back with customers. As a result of this, you have heard negative comments from customers when they were at the register that they weren't satified with their food, nobody offered them desert, or their coffee was always cold. In your counseling review you pointed out to Frank that these problems could easily be resolved if he checked back with the customers within a few minutes of being served their order. You also told Frank this must be corrected immediately. Frank agreed that he has been negligent in this area and will not let this happen again. You agree to follow-up with Frank on March 10 to let him know how he is doing. On March 10 you are going to meet with Frank to let him know that there has been a very noticable improvement in this area and that you have had no complaints. What might you do to maintain this level of performance.

NOW, TURN TO THE KEY PRINCIPLES ON MAINTAINING IMPROVED PERFORMANCE.

KEY PRINCIPLES: MAINTAINING IMPROVED PERFORMANCE

It's always easy to follow-up on an employee who has improved because it does not deal with confronting the employee with negative feedback. In fact, the key principle involved in maintaining improved performance is to praise the employee for improvement. This form of recognition has several advantages (1) it enhances the employee's self esteem, (2) it recognizes that the employee has improved, (3) it allows the supervisor to be perceived as a source of help, (4) it creates an environment of teamwork. Some of the key principles that a manager might want to capitalize on in this situation include the following:

1. DESCRIBE THE IMPROVED PERFORMANCE

   Let the employee know that you have observed a positive change in the performance and reinforce this with a "thank you" or "I knew you would improve."

2. LET THE EMPLOYEE TALK

   Get feedback from the employee. Chances are he/she is going to feel good. Give him/her a few minutes to "brag" a little about turning a negative behavior into a positive one.

3. THANK THE EMPLOYEE

   Leave the discussion on a positive note. Thank the employee for his/her efforts. Let the employee know that you really appreciate his/her efforts.

PLEASE TURN TO THE NEXT SHEET AND COMPLETE THE REVIEW EXERCISES

REACTION TO SITUATION #6

1. What benefit is there to saying thanks to an employee who has improved on his performance for the following:

   A. The employee:

   B. The manager:

   C. The other employees:

   D. The operations:

2. Review your approach in the case study. Is there anything you might have done differently?

CASE STUDY #7

You are a new manager at your unit. Your unit does not have a safety committee that meets on a regular basis. Apparently attempts were previously made to get the safety committee rolling but there was either little direction or follow-up. One thing is certain, you do have some good people at the unit who could make this a success. You have decided to ask Sue, a five year waitress and Don, a six year cook to act as chairpersons on the committee. This new responsibility does not include an increase in pay, but from what you know of Sue and Don, they will jump at the opportunity of assuming this leadership responsibility. What approaches might you take on delegating this responsibility to Sue and Don?

TURN TO THE KEY PRINCIPLES ON DELEGATING

KEY PRINCIPLES: DELEGATING RESPONSIBILITY

New supervisors are sometimes hesistant to delegate because it takes time to understand a group and gain confidence in the employees. In addition, supervisors fail to delegate because they feel they can do the job better and faster. In some cases this might be true. But more often than not, this "I can do it better myself" attitude will backfire over a long period of time. Delegation, if properly handled, can build a more productive work group. However, if improperly handled, it can lead to disaster, leaving the manager to "undo" a lot of mistakes. Before delegating responsibility to an employee (regardless of the level of position), some of the major factors involved in this process include the following:

1. DETERMINE WHAT IS TO BE DELEGATED

   Several functions in the unit simply cannot be delegated. Areas involving security and employee relations are a sole management function. Therefore, it is important to recognize which functions can and cannot be delegated.

2. PLAN THE DELEGATION

   When planning the delegation, the manager should consider the following questions:

   A. What skills, knowledge, or abilities are needed to perform the task?

   B. Who possesses these qualities now?

   C. Who can be trained? How long will this training take?

   D. Who is interested in doing the task?

   These questions involve selecting the right person for the job (the key most important factor in delegating responsibility).

3. DISCUSS THE DELEGATION

   The manager should meet with the employee to discuss the task being delegated. An agreement should be reached on the scope of responsibility involved. At this point the manager should also

DESCRIBE THE NEW RESPONSIBILITY IN DETAIL.
This involves finding out whether the employee can immediately handle the task, or if additional coaching or training is needed. Before a manager delegates he/she must be certain that the employee can handle the task. Therefore, training the employee is critical to whether he/she will be successful.

4. LISTEN TO THE EMPLOYEE'S COMMENTS

This involves determining whether the employee is interested in assuming this responsibility. The reaction of the employee is critical to the success of your efforts. The employee may also have some suggestions on how the delegation could best be carried out. Also, make sure that what you're delegating is meaningful and challenging to the employee. If you use delegation as a means of "dumping" work, the outcome is likely to be disappointing.

5. COMMUNICATE THE DELEGATION

This is frequently an area that is neglected. It's important that others who may come in contact with the employee are aware of this additional responsibility. This will minimize any confusion that may exist when the employee begins doing the new task.

6. EXPRESS YOUR CONFIDENCE IN THE EMPLOYEE

Let the employee know that you feel he/she can handle this new assignment. Also, provide reassurance by providing the employee with assistance when he/she reaches some road blocks.

7. MONITOR PERFORMANCE

This is the final step in evaluating the employee's performance. This evaluation should be in the form of periodic feedback to the employee on how well he/she is doing. In addition, the employee can also be asked to suggest other potential areas for delegation.

PLEASE TURN TO THE REVIEW SECTION ON DELEGATION

REACTION TO SITUATION #7

1. Before delegating a task to an employee, we should make sure he/she either knows how to do the job or be willing to train him/her. Why?

2. Why should we gain committment from the employee before delegating a task to him/her?

3. Review your case study approach. Is there anything you might have done differently? If so, what?

PREPARATORY MANAGEMENT PROGRAM - PERFORMANCE EVALUATION

To the employee: This performance evaluation is to be completed monthly during your participation in this program. All completed forms are to be kept in the office for your District Manager to review after you have discussed this critique with your Unit Manager.

Name: _____

Date: _____

Previous dates of evaluation:

_____

_____

What have you completed in the PMP since your last critique? (If this is your first critique, list the completed activities since you began the program.)

_____

_____

_____

What strengths have you developed in the past month that would make you a better manager?

_____

_____

_____

What weaknesses have you discovered about yourself in the past month that you realize need to be improved?

_____

_____

_____

What additional assignments, if any, do you think should be assigned to you to better prepare you for management?

_____

_____

Approximately, how much time have your managers spent with you on this program? _____ (hours/week). The most challenging task I completed this month was _____

_____. Explain your answer__

_____.

The easiest task I completed this month was _____

_____.

Explain your answer _____

_____.

I feel _____

about my progress in the Preparatory Management Program.

_____ _____

Employee Signature Date

_____ _____

Unit Manager Signature Date

PREPARATORY MANAGEMENT PROGRAM - PERFORMANCE EVALUATION

To the Unit Manager: This performance evaluation is to be completed monthly during the employee's participation in this program. Keep all completed evaluation forms in a designated file in the office for your District Manager to review after you have discussed this critique with the employee.

Participant's Name: _____

Acceptance Date in PMP: _____

This is the _____ critique on this participant.

Since the last critique, what has the participant completed, to your satisfaction in the program? (If this is the first critique, list the participants accomplishments since entering the program).

_____

_____

_____

At this point in the program, what is your recommendation concerning this participant, for promotion to management? Explain your answer: _____

_____

_____

What areas, if any, does this participant need to improve in, to be an acceptable manager? _____

_____

_____

_____

What further projects and assignments should be given to the participant to better develop him/her for management?

_____

_____

_____

_____

Please include a statement about the participants' level of initiative toward completing this program?

_____

_____

_____

Projected date of program completion_____

How much time have you, as a manager, spent with the participant in completion of this program?_____/wk.

_____ _____
Manager Signature Date

_____ _____
Participant's Signature Date

Participant's Comments:_____

_____

_____

_____

_____

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
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No. 97-646

In The

Supreme Court of the United States

October Term, 1997

DENNY'S, INC.,

Petitioner,

vs.

RONALD K. THOMAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, during the *prima facie* stage of a failure to promote case, Plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

2. Whether a mixed motive instruction must be given in a failure to promote case when requested by the Plaintiff, even though the Defendant did not request the instruction, the only defense offered for not promoting Plaintiff was his lack of qualifications, and no direct evidence was presented that the decisionmakers placed substantial negative reliance on an illegitimate criterion.

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REFERENCE TO OPINIONS RENDERED BY THE COURTS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 111 F.3d 1506 (10th Cir. 1997). A copy of the opinion is reprinted at pages A-1 through A-18 of Petitioner's Appendix ("Pet. App."). The judgments and findings of the District Court (Pet. App. A-19 through A-29) have not been reported.

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF THE CASE

The first two paragraphs of Petitioner's ("Denny's") Statement of the Case adequately set forth the proceedings at trial. However, Denny's discussion in the third paragraph of its Statement of the Case is almost entirely incorrect.

The Tenth Circuit held that the trial court erred in giving an improper instruction setting forth what Respondent ("Thomas") had to prove in order to establish a *prima facie* case. The Tenth Circuit also held that the trial court erred in refusing to give a "mixed motive" instruction requested by Thomas. The Tenth Circuit's opinion does not conflict with any decisions of this Court or with the decisions of any other Circuits.

Contrary to Denny's Statement, the Tenth Circuit did not rule that Thomas did not have to show during the *prima facie* stage of his case that he at least had the same objective qualifications for the job as the person hired. The Tenth Circuit correctly held that the promotion decisions at issue were based on purely subjective criteria. Further, contrary to Denny's Statement, the Tenth Circuit correctly found that sufficient direct evidence of retaliation by decisionmakers at Denny's was introduced to require the giving of a mixed motive instruction.

COUNTERSUMMARY OF FACTS

In its Summary of Facts, Denny's presents over seven pages of what it considers to be significant facts. Denny's carefully avoids any reference to facts unfavorable to it. Thomas believes that it is important to set forth facts not mentioned by Denny's in its Summary, but Thomas will attempt to confine himself to facts relevant to the decisions concerning jury instructions made by the Tenth Circuit.

Thomas introduced a significant amount of evidence to establish that he was qualified to be promoted to management at Denny's. As indicated in the Tenth Circuit's opinion, Thomas began to work at Denny's in 1978. Although the Denny's District Leaders had the final authority to promote employees to management positions, the General Managers recommended those employees whom they believed were good candidates. Although Thomas was granted interviews with District

Leaders, when he sought promotion to management during the period from 1984 through November 1992, he was never promoted.

Irene Johnson, who was a General Manager at Denny's, testified that she felt Thomas was a viable candidate for promotion to management as early as 1983. She recommended to District Leaders that Thomas be promoted to management on three separate occasions during the period 1987 to 1989.

Masood Kasim was another General Manager who recommended Thomas for promotion to management several times during the 1987 to 1990 period. Kasim testified that one of his reasons for seeking Thomas' promotion to management was the work which Thomas had done as a unit aide for Kasim. The unit aide position was often a stepping stone to management at Denny's, because it involved running the restaurant in the absence of a manager or an assistant manager. Kasim testified that the unit aides were in charge of the restaurant when a manager was not present.

Other persons who worked as Denny's managers, including Al Clement and Shoib Ahmed, also testified concerning Thomas being qualified for a management position and his excellent work and responsibility in the position of a unit aide. Although Denny's contends that the unit aide position was that of a mere "babysitter," Irene Johnson testified that she was commended as manager of a Denny's restaurant for running a very efficient restaurant for one month without any managers – just the use of unit aides – one of whom was Thomas. This testimony demonstrates that, at least in the case of

Thomas, work as a unit aide was tantamount to the work of a manager.

In addition to this massive amount of testimony which would have allowed the jury to conclude that Thomas was qualified to be promoted to management, Thomas himself also testified that he was qualified. He testified that, with one exception, he was better qualified than the non-African Americans who were promoted.

With regard to testimony concerning retaliation by Denny's, the evidence which supports Thomas' retaliation claim is accurately summarized in the opinion. (Pet. App. at A-4).

REASONS FOR DENYING REVIEW

I. The First "Question Presented for Review" Is Not Raised By The Tenth Circuit's Opinion.

Denny's submits the following as its first "Question Presented for Review":

> Whether, during the *prima facie* stage of a failure to promote case, Plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

This question cannot be a basis for review on certiorari here because the Tenth Circuit never held that a plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired. Denny's is therefore asking this Court to grant certiorari to review a purported "holding" which, in fact, never existed.

The Tenth Circuit was very clear in stating that the qualifications for a management position at Denny's were purely subjective. The opinion states:

> In the instant case . . . the qualifications at issue were purely subjective. As Denny's conceded in oral argument, it had no posted objective criteria that were applied across the board to all candidates for promotion.

Pet. App. at A-7.

Denny's does argue, albeit incorrectly, that there were objective qualifications. Even if Denny's were correct with regard to this point, it would not salvage its question presented. The Tenth Circuit's view as to objective qualifications was that the qualifications at issue were subjective, not objective. The Circuit never held that, assuming that objective qualifications were at issue, Thomas did not have to show that he had at least the same objective qualifications as the person hired.

The simple answer to Denny's first "Question Presented," therefore, is that it is not presented in this case. If it is necessary to present anything else to show that Denny's is wholly incorrect in presenting its first "Question Presented," it is only necessary to point to *EEOC v. WilTel, Inc.*, 81 F.3d 1508 (10th Cir. 1996), which was cited by Denny's in its Petition. When confronting actual objective qualifications which were posted by the employer concerning a position, the Tenth Circuit said, "It is undisputed that [plaintiff] did not possess the posted minimum qualifications of two to four years of customer service/ telephone experience . . . " *WilTel* at 1515. Based upon the

failure of plaintiff in *WilTel* to meet these *objective* requirements, the Tenth Circuit concluded that she was not qualified for the position. Therefore, contrary to Denny's position, it is evident that the Tenth Circuit requires employees seeking promotion to prove that they have truly objective qualifications in situations in which those qualifications are actually required by an employer.

II. The Tenth Circuit's Opinion Does Not Conflict With Decisions of This Court or Any Other Circuit Court And Correctly Follows *Kenworthy v. Conoco, Inc.*, 797 F.2d 1462 (10th Cir. 1992) In Concluding That The Trial Court's "Qualified Applicant" Instruction Was Erroneous.

The "Qualified Applicant" instruction given by the trial court required Thomas to prove, as part of his *prima facie* case, that " . . . he was at least as well qualified for the position as the person hired instead of him." The Tenth Circuit, in its opinion hereby, relied on *Kenworthy* in concluding that the "Qualified Applicant" instruction was erroneously given.

In the case at bar, Denny's argued that Thomas was not "qualified" for promotion based upon his purported failure to meet certain subjective criteria. As the opinion notes, such subjective criteria are "particularly easy for an employer to invent in an effort to sabotage a plaintiff's *prima facie* case and mask discrimination." Pet. App. at A-6, *citing Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1005, n.8 (10th Cir.), *cert. denied*, 116 S.Ct. 2500 (1996). Therefore, the opinion concludes that the employer's subjective reasons for determining lack of "qualifications" are not

properly considered at the *prima facie* stage. Pet. App. at A-6.

Denny's does not challenge the Tenth Circuit's conclusion that subjective reasons should not be considered at the *prima facie* stage. Instead, Denny's argues that Thomas did not have the same "objective qualifications" as those who were promoted. In reality, there were no "objective qualifications". Having conceded before the Tenth Circuit that there were no posted objective qualifications for the position for which Thomas applied (Pet. App. at A-7), Denny's now seeks to ignore this admission and argue before this Court that there were really objective qualifications after all. Assuming, for the sake of argument, that objective qualifications existed, if they were not posted, and if they were not applied across the board to all applicants, how can they truly be called "objective"?

On page 16 of its Petition, Denny's sets forth certain purported "objective qualifications" of various persons promoted by Denny's. These "objective qualifications" include college degrees or various amounts of college credits and completion of a developmental packet ("UPP"). Denny's misses the point. Denny's does not refer to any evidence in the record which indicates that Denny's *required* any amount of college hours or the completion of the UPP for promotion to management. Tom Taylor, a Regional Human Resources Manager for Denny's, admitted that there was no requirement that a UPP be completed prior to promotion. (Respondent's Appendix at A-1).

Throughout its Petition, Denny's misuses the terms "objective qualifications" and "objective job requirements." Just because something is "objective" does not mean that it is a "qualification" or a "requirement." Thomas would agree, for example, that completion of six college credit hours is an "objective" fact. However, because college hours were never required for promotion at Denny's, completion of those hours would neither be an "objective qualification" nor a "requirement."

Denny's also presents the argument that the trial court, in the instruction rejected by the Tenth Circuit, limited the jury's consideration to "objective qualifications" because one sentence of the instruction says, "You should consider evidence concerning the education, training or experience necessary to perform the job."

There is absolutely nothing in the instruction directing the jury *not* to consider factors other than education, training and experience. The jury obviously could have considered testimony as to purported facts which even Denny's admits were subjective (poor interviewing and communication, lack of initiative).

Denny's argument, however, suffers from a more fundamental flaw. Denny's claims that "education, training or experience" are objective job requirements. Thomas would acknowledge that they *can* be in certain situations. An employer can, for example, have a corporate policy which provides that all managers shall be college graduates. Denny's obstinately ignores the fact that it had no such policy. Denny's had no minimum

education requirements, no minimum training requirements, and no minimum experience requirements for promoting employees to management.

Denny's also ignores the fact that Thomas was not only repeatedly recommended for promotion by General Managers (Pet. App. at A-3 and A-4), he also was repeatedly interviewed by District Leaders. (Pet. App. at A-4). If Thomas truly lacked some "objective" qualification, surely he would have been told this and would not have been repeatedly interviewed.

Denny's views with alarm the possibility that an applicant would be able to establish a *prima facie* cause by simply saying, "I'm qualified." (Petition at 17). Denny's apparently wants to ignore the facts in this case, in which members of Denny's management were constantly indicating to other members of Denny's management that Thomas was qualified by recommending him for promotion to management. (Pet. App. at A-3 and A-4).

In addition to disagreeing with the Tenth Circuit's analysis of the facts in the record, Denny's also disagrees with the Circuit's analysis of the "Qualified Applicant" instruction. Denny's claims that this instruction did not direct the jury to consider the employee's subjective business reasons at the *prima facie* stage. Denny's also states that " . . . there is absolutely nothing in the record even to suggest that the jury considered subjective job requirements at the *prima facie* stage of the case." (Petition at 13).

Denny's is incorrect. The instruction clearly allowed the jury to consider the subjective criteria, and Denny's presented much evidence at trial which was subjective even under Denny's definition and which Denny's

claimed supported its contention that Thomas simply was not "qualified" for a management position. (Pet. App. at A-4). All of this testimony was based on Denny's subjective criteria for promotion. For Denny's to present all of that evidence and then claim that the jury probably did not consider it for purposes of determining whether Thomas was "qualified" at the *prima facie* stage is contrary to logic.

Denny's argues that some of the language in Thomas' requested instruction relating to *Kenworthy* was redundant. As stated in the Petition, "Specifically, Thomas' counsel wanted the trial court to instruct the jury that Thomas could establish that he was qualified for promotion through his own testimony and the testimony of others." (Petition at 18). Thomas submits that this "redundancy" argument is premature and wholly inappropriate in a petition for a writ of certiorari.

The Tenth Circuit's opinion does not set forth the exact language which the trial court is to use when it instructs the jury on remand. Although Thomas certainly hopes that the trial court will use his requested instruction *in toto*, the trial court must make the ultimate decision as to what language will be most appropriate in light of the Tenth Circuit's opinion. In short, Denny's argument is made to the wrong court.

III. The Opinion Is Not In Conflict With Decisions Of This Court Or With Decisions Of Other Circuit Courts Regarding When A Mixed Motive Instruction Must Be Given.

Denny's argument concerning the "mixed motive" instruction would be appropriately called the "magic words" argument. If ever there were a case in which a jury could find that an employer made statements directly reflecting a retaliatory attitude, this is the case.

Thomas filed a discrimination complaint with the Oklahoma Human Rights Commission in 1986. Irene Johnson, General Manager at Denny's, testified that when she brought up Thomas' name to District Leader Reynolds for promotion, Ms. Reynolds stated that they had a problem with Thomas, namely his suit against Denny's. When Ms. Johnson mentioned Thomas' promotion to Mr. Agorichas (with Denny's Human Relations Department), he too mentioned that Thomas had a suit against Denny's. District Leader Rapier told Ms. Johnson that they would never allow Thomas to become a manager because he had sued Denny's. Denny's General Manager Masood Kasim testified that he told District Leader Darweesh that he wanted to take Thomas as a manager and asked why he had not been promoted. Darweesh stated: "Would you promote somebody who has sued?" (Pet. App. at A-4).

In the face of all this direct evidence of retaliation, Denny's contends the evidence was insufficient to justify a mixed motive instruction because no one in "upper management" used the magic words: "Thomas will not be promoted because he filed a discrimination complaint."

Denny's argument concerning "upper management" only serves to confuse the issue. Ms. Irene Johnson's testimony at trial established that the District Leaders had the final authority to promote Thomas (Respondent's Appendix at A-3), and the three District Leaders making the statements set forth above had the authority to promote Thomas at the time they made the statements. Because the statements were made by the persons with authority to make the promotion decisions, the issue of what was or was not done by persons further up in Denny's corporate hierarchy is of no consequence.

Therefore, Denny's sole argument with regard to the "mixed motive" instruction issue is that the District Leaders did not use the "magic words." Denny's argument was emphatically rejected by the Second Circuit in *Ostrowski v. Atlantic Mut. Ins. Companies*, 968 F.2d 171, 181 (2nd Cir. 1992). *Ostrowski*, in turn, was relied upon by the Tenth Circuit in its opinion. *Ostrowski* quotes from *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1185 (2nd Cir. 1992), as it rejects the argument Denny's presents here:

> Strictly speaking, the only "direct evidence" that a decision was made "because of" an impermissible factor would be an admission by the decisionmaker such as "I fired him because he was too old." Even a highly probative statement like "You're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision. But juries have always been allowed to draw such inferences.

Ostrowski at 181.

The Second Circuit in *Ostrowski* went on to reaffirm its conclusion in *Tyler* that a plaintiff may prove that the discriminatory *animus* was a motivating factor through either direct or circumstantial evidence. *Ostrowski* at 181-182. The Second Circuit in *Ostrowski*, and the Tenth Circuit here have rejected the "magic words" argument. Denny's does not cite any opinion which accepts the "magic words" argument.

Most importantly, this Court has never embraced the notion that any "magic words" are required to entitle a plaintiff to a mixed motive instruction. Although Denny's cites *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), Denny's also candidly acknowledges that in *Price Waterhouse*, "This Court made clear that the burden shifting threshold a plaintiff must cross is proof that the forbidden *animus* was at least one of the motivating factors in the employment decision." Petition at 20.

The question here is whether that proof be by "direct evidence" or whether it can be by circumstantial evidence which shows a direct intent to discriminate. There is no hint in *Price Waterhouse* that proof that the forbidden *animus* was a motivating factor cannot be presented by circumstantial evidence. Logically, the "direct evidence" language relates to proof of actual *animus* as opposed to establishment of *animus* through inference as approved by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Price Waterhouse itself illustrates the feeble nature of Denny's "magic words" argument. Many of the facts

considered by this Court in *Price Waterhouse* to be evidence of discriminatory *animus* would not pass muster under Denny's "magic words" test. There is no evidence that any agent of the defendant in *Price Waterhouse* ever expressly stated that the plaintiff was not promoted because she was a woman. Instead, this Court concluded that a mixed motive instruction should have been given because of statements which were made by persons in the decisionmaking process. For example, plaintiff was described as being "macho" and "overcompensat[ing] for being a woman." Strictly speaking, this was not "direct evidence" (as opposed to "circumstantial evidence") of intentional employment discrimination. It was, however, "direct evidence" of *animus* as opposed to evidence of discrimination based upon the inferential analysis in *McDonnell-Douglas*.

For some reason, Denny's cites *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). *Fuller* provides strong support for Thomas, since it expressly follows *Ostrowski* and clarifies what the "direct evidence" requirement really means.

Fuller first follows *Ostrowski* by pointing out that not all evidence probative of discrimination will entitle a plaintiff to a mixed motive charge. *Fuller* then explains why the courts impose such a limitation, "Otherwise, any plaintiff who is able to establish a *prima facie* showing in a pretext case would qualify for a mixed motive instruction, conflating the two categories of cases and subverting the Supreme Court's efforts to distinguish the two theories. (Citations omitted)." *Fuller* at 1142. This language makes it clear that the inference of discriminatory intent envisioned in *McDonnell-Douglas* is not enough to

qualify for a mixed motive instruction. *Fuller* cites with approval *Scheininger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991) in which the Eighth Circuit stated, "Simply because a discriminatory reason might be inferred from a *prima facie* case does not mean that a mixed motive case exists."

Finally, citing *Ostrowski* with approval, the *Fuller* court stated, "What is required instead is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Id. Fuller* therefore makes it clear that the "direct evidence" language in *Price Waterhouse* simply means evidence, whether direct or circumstantial, which reflects the alleged discriminatory attitude directly and bears directly on the contested employment decision. Because it follows *Ostrowski*, it is evident that *Fuller*, like *Ostrowski*, rejects the "magic words" argument.

Denny's also relies on *Walden v. Georgia-Pacific Corp.*, 1997 WL 597439 (3rd Cir. Del. 1997) (citation of 1997 WL 584552 provided by Denny's has been superseded). Not only does *Walden* fail to support Denny's "magic words" argument, it also points out that "direct evidence" in the context of employment discrimination does not indicate that circumstantial evidence is not acceptable. The *Walden* court stated:

> In point of fact, the term "direct evidence" is somewhat of a misnomer, for we have held that certain circumstantial evidence is sufficient for a mixed motive instruction, if that evidence can "fairly be said to reflect" the alleged unlawful basis for the adverse employment decision.

[*citing Hook v. Ernst & Young*, 28 F.3d 366, 374 (3rd Cir. 1994)].

The comment by the *Walden* court that a mixed motive instruction is warranted only when the evidence is sufficient to permit the factfinder to infer that a discriminatory or retaliatory attitude was more likely than not a motivating factor in the employer's decision certainly provides no impediment for Thomas. Here there was plentiful evidence from which the jury could have reached such a conclusion as to discrimination, retaliation, or both.

Although *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) does not discuss *Ostrowski*, it provides no indication that the Fifth Circuit differs from the *Ostrowski* opinion with regard to the evidence needed to support the giving of mixed motive instructions when requested by plaintiff. *Mooney* provides no support for Denny's "magic words" argument. *Mooney* provides the Fifth Circuit's definition of "direct evidence" in the context of employment discrimination:

> In *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858 (5th Cir. 1993), we defined direct evidence in the employment discrimination context: "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory *animus*] without inference or presumption.

Mooney at 1217.

In *Brown v. East Mississippi*, plaintiff's supervisor, one Pippen, repeatedly used racial slurs when referring to plaintiff. Pippen also participated in the disciplinary

employment decisions concerning which plaintiff complained. *Brown* at 861. However, there was no evidence in *Brown* that Pippen, or anyone else, testified that the employer disciplined plaintiff because of his race. Discriminatory *animus* was established by the racist remarks, even though the "magic words" were lacking. Because there was no testimony directly linking the racial *animus* with the disciplinary decision, the evidence was circumstantial. It seems clear that the Fifth Circuit requires proof of discriminatory *animus* by what would be commonly called direct evidence, but that the Fifth Circuit would allow the connection between *animus* and the employment decision to be established by circumstantial evidence. In this respect, the Tenth Circuit's Opinion is in accord with the Fifth Circuit because there was clearly direct evidence of discriminatory (retaliatory) *animus* by decisionmakers against Thomas.

In *Brown*, the statements made by a decisionmaker disclosed a discriminatory *animus* toward African-Americans. In *Price Waterhouse*, statements by decisionmakers disclosed a discriminatory *animus* toward women. Here, the statements by decisionmakers disclosed a discriminatory/retaliatory *animus* toward Thomas for seeking relief for alleged racial discrimination. Just as in *Brown* and *Price Waterhouse*, the evidence of the *animus* is direct.

In *Mooney*, the only purported errors relating to instructions raised on appeal were the failure to give a mixed motive instruction and the failure to give a pattern and practice instruction. Unlike the present case, there was no challenge to the *McDonnell-Douglas* inference

instructions. The analysis of the evidence of discrimination in *Mooney* is clearly distinguishable from the evidence here, as shown below. However, even if it were not, the Fifth Circuit noted that in *Mooney*, the absence of a mixed motive instruction could have never changed the result because a jury (properly instructed on the *McDonnell-Douglas* elements) "plainly did not believe [plaintiffs'] testimony under the lower 'inferential evidence' standard employed in the *McDonnell-Douglas* analysis." *Mooney* at 1219, n.17.

The Fifth Circuit in *Mooney* did conclude that various statements were not sufficient to constitute "direct evidence" under *Price Waterhouse*. These statements, however, were quite different from the statements made by the Denny's District Leaders.

Two of the statements in *Mooney*, even though they were made by decisionmakers, were not specifically directed at a plaintiff. Thim's supervisor told him, "If I can replace an expensive American expat with a younger and cheaper Brit, I can save the company a lot of money." Unlike the statements of the Denny's decisionmakers, which were specifically directed at Thomas, Thim's supervisor merely made a "generic" statement which was not directed specifically at Thim. The same is true of the decisionmaker's statement regarding Mooney which was, "They're going to get rid of the older employees with the higher salaries." The statements relating to Olson and Williams, while referring to age discrimination, were not made by the decisionmakers and, as the Fifth Circuit pointed out, were merely speculation.

In arguing that *Mooney* indicates that the Tenth Circuit reached the wrong result here, Denny's is comparing apples to oranges. Denny's fails to show that the Fifth Circuit, or for that matter *any court* has applied a different legal standard to the mixed motive instruction issue than did the Tenth Circuit here.

Even if Denny's could somehow show that the *Mooney* opinion establishes that the Fifth Circuit would have reached a different result than the Tenth Circuit concerning the mixed motive instruction (and Denny's has fallen far short of such a showing), this still would provide no basis whatsoever for granting certiorari. The most that Denny's would then be able to establish would be that the Fifth Circuit and the Tenth Circuit differ as to whether the specific facts here constitute direct evidence of discriminatory *animus*.

As final authority for its mixed motive argument, Denny's relies on *EEOC v. WilTel, Inc.*, 81 F.3d 1508 (10th Cir. 1996) and other Tenth Circuit cases cited therein. Leaving aside the question of whether conflicting Tenth Circuit cases would provide a valid basis for certiorari, there is no conflict between the Tenth Circuit cases cited by Denny's and the present case.

In *WilTel*, plaintiff was an evangelical Christian whom WilTel refused to hire. Sometime after the decision was made not to hire plaintiff, one of the persons involved in interviewing plaintiff stated, "I don't like [plaintiff] because she is into all that Jesus shit and she doesn't fit in." *Id.* at 1513. Although the Tenth Circuit concluded that this was not direct evidence of discriminatory refusal to hire, it did so because the evidence did not

support the finding that the person making the statement played a dominant role in the interviewing process. Here the evidence was uncontradicted that the District Leaders had the final authority to decide whether to promote Thomas.

In *Heim v. State of Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993), plaintiff argued that there was direct evidence of discriminatory intent because of one comment made by her supervisor. In an angry outburst, the male supervisor said, "I hate having fucking women in the office." *Heim* at 1546. The Tenth Circuit simply agreed with the trial court's holding that the remark was "inappropriate" and directed toward women in general. This kind of generic statement is far removed from the specific statements pertaining to Thomas and his retaliation claim in the case at bar.

Ramsey v. City and County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990) provides no support for Denny's. Although a man in a supervisory position over plaintiff testified that he felt women were better suited for some jobs than for others, there was no evidence that he acted on his discriminatory beliefs. Once again, these statements were generic and did not focus on plaintiff.

With regard to *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537 (10th Cir. 1987), four plaintiffs prevailed at trial, while three did not. The unsuccessful plaintiffs appealed, arguing that they had presented direct evidence of intentional age discrimination, but the Tenth Circuit disagreed. The opinion does not provide sufficient details to establish whether the discriminatory statements were made by decisionmakers and whether or not they focused on any

of the unsuccessful plaintiffs. Certainly *Furr* provides no support for an argument that the *Furr* court would have reached a different result than did the Tenth Circuit in this case.

IV. The Tenth Circuit Did Not Depart From The Accepted And Usual Course of Judicial Proceedings.

Although Denny's makes half-hearted statements indicating that the opinion conflicts with decisions of other Circuit Courts of Appeal (Petition, pp. 19, 30), Denny's makes no serious attempt to argue this point. As noted above, the Tenth Circuit's analysis as to the legal standard to be applied does not differ from that of other circuits. Denny's tacitly recognizes this, since its only significant argument as to why this Court should accept certiorari is based on the Tenth Circuit's purported "departure from the accepted and usual course of judicial proceedings."

In its argument that the Tenth Circuit has departed from the accepted and usual course of judicial proceedings, Denny's complains that the opinion fails to include various facts which Denny's deems important. In view of the fact that the thorough opinion encompasses 14 pages in Petitioner's Appendix, Thomas submits that this Court should reject Denny's bizarre argument that the opinion is too short. Surely this Court has no desire to direct the Courts of Appeal to write more lengthy opinions, merely to include an exhaustive statement of the positions of both sides.

In reality, the section of Denny's Petition purportedly arguing that the Tenth Circuit has "departed from the accepted and usual course of judicial proceedings" is merely a continuation of Denny's *modus operandi* in its Tenth Circuit briefing. Denny's seeks to have this Court focus on all the facts (or purported facts) which favor Denny's and ignore the facts which favor Thomas. Such a blatant attempt at ignoring the role of the factfinder should be given short shrift by this Court, which doubtless has more important tasks at hand than wading through evidentiary minutia. In fact, this portion of Denny's Petition would be appropriate only in an appeal in which Denny's was asserting that the verdict was against the weight of the evidence.

Denny's complains that the Circuit ignored evidence that Denny's hired other African-American managers. The issues in this case were whether Thomas was discriminated against or retaliated against. Thomas did not rely on statistical evidence. Evidence of promotion of or offers of promotion to other African-Americans, while it may well be relevant at the trial of a discrimination claim, has nothing to do with the issues involved in this petition for certiorari.

Most of the other points raised by Denny's in this section of its Petition involve matters which obviously can only be considered by the factfinder. Thus, Denny's laments that the Tenth Circuit did not focus on factors which might impeach the opinions of Denny's managers Irene Johnson and Masood Kasim insofar as they believed Thomas was qualified for promotion. Denny's goes on to complain that testimony of various witnesses purportedly favorable to Denny's was ignored by the Tenth Circuit.

Once again, this testimony, while proper for consideration by the trier of fact, has absolutely nothing to do with the issues presented here.

Finally, although Denny's must acknowledge (and has acknowledged) that Thomas properly objected to the Qualified Applicant instruction at trial, Denny's argues that Thomas objected for the first time to the last sentence of the instruction in his Reply Brief in the Tenth Circuit. Apparently, Denny's is contending that, although Thomas properly objected to the instruction at trial, the objection was not "timely, clear and specific" because it did not focus specifically on the last sentence of the instruction.

Denny's ignores the fact that, pursuant to the trial court's request, Thomas, after objecting to the Qualified Applicant instruction, proposed an instruction which Thomas deemed suitable. (Pet. App. at A-3). That proposed instruction did not include the last sentence of the Qualified Applicant instruction. In addition, Thomas' counsel specifically cited *Kenworthy* to the trial court, making it abundantly clear that the Qualified Applicant instruction would allow Denny's to raise its proffered nondiscriminatory reasons for not promoting Thomas to prevent him from establishing a *prima facie* case.

For all of the above reasons, the petition should be denied.

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November 10, 1997

APPENDIX

* * *

[p. 1197] Q. You told us earlier that he had some no [sic] response.

A. That's correct.

Q. And you're telling the jury, sir, that you wanted to provide him an opportunity; is that right?

A. Yes, sir.

Q. Sir, he had just been made employee of the year of that unit. Are you aware of that?

A. Yes.

Q. Tell the jury, please, what is required to be made an employee of the year.

A. Employee of the year is, again, a commendable award. It is an award directed at a unit level or an hourly employee. It can be a cook, it can be a server or a waitress. It can be a bus person or one of our hostesses or hosts. But it is directed at characteristics of a unit level employee and does not necessarily – or is not characteristic of anything in the management ranks.

Q. Sir, there's no requirement that a developmental packet be completed prior to promotion, is there?

A. No, sir.

Q. And, sir, you know Mr. John Lynch, don't you?

A. Yes, sir.

Q. Mr. John Lynch came to you asking for Mr. Thomas to just be given the chance to be put into MIT and you told him it's in legal hands, didn't you?

* * *

[p. 733] Denny's management, did it not?

A. Yes, it did.

Q. The college courses that you took, I understood that you said one today, but I believe previously you said two courses at Mason City?

A. At Mason City I took one small business course.

Q. And you took another one somewhere, did you not?

A. After I was in place with Denny's, I took some night courses out at TJC here in Tulsa.

Q. What year were those?

A. Off and on, let's see, from '86 to '90, '87 to '90.

Q. Do you believe that the courses that you took were very valuable for you and helped you in your work?

A. Education is always valuable.

Q. We've had testimony from Ahmed, Mr. Kasim, and they spent a lot of time at Rogers State College and other places trying to help them get into management. Would you agree that's a good idea and a good thing to do?

A. Yes.

Q. And when you came – by the way, you never hired, pardon me, you never promoted anybody in the past; isn't that correct? Never promoted anybody into management at all in your entire experience?

A. No, the final decision was always the district manager's.

Q. So, the answer to my question, you've never been in

* * *

(3)

Supreme Court, U.S.
FILED
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No. 97646

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DENNY'S, INC.,
Petitioner,
v.
RONALD K. THOMAS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Tenth Circuit

PETITIONER'S REPLY BRIEF

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Respondent Ronald K. Thomas ("Thomas") has opposed Petitioner Denny's Inc. ("Denny's") Petition for Writ of Certiorari. Denny's hereby submits its Reply to Thomas' Response Brief.

REPLY TO COUNTERSUMMARY OF FACTS

In his Countersummary of Facts, Thomas argues that because certain members of Denny's management recommended Thomas for promotion into management, this proved he was qualified for promotion. The argument assumes that because these former managers expressed their opinion of Thomas' qualifications at trial that the jury and trial court found them credible. However, the jury and trial judge found that Thomas was not qualified for promotion into management. Moreover, Thomas fails to acknowledge the following evidence produced at trial that had a tremendous impact on the jury's and the trial court's findings:

(1) Several members of management testified that Thomas told them that he had completed the preparatory management packet ("PMP"), and as a result they recommended him for promotion. However, Thomas did not complete the packet, and these managers learned at trial for the first time that Thomas had not completed the PMP. (Pet. App. at A-61 to A-62; A-115 to A-116; Pet. Supp. App. at 1-2)

(2) Denny's requested that Thomas, and other employees seeking promotion, complete the PMP (also known as unit promotable packet "UPP") and college courses to assist them in developing their knowledge of the restaurant industry. The other employees complied with Denny's objective job requirements for promotion into management. (Pet. at 16.) However, Thomas did not complete the PMP and did not complete any courses that would assist him in understanding the operations of a restaurant.

(3) John Lynch ("Lynch"), a former General Manager who had recommended Thomas for management and who was called as a witness in Thomas' case in chief, testified that he had recommended Thomas for promotion into management because Thomas told him that he had completed the PMP. Lynch further testified that had he known Thomas had not completed the PMP and had made false statements to him, Lynch would not have recommended Thomas for promotion into management. (Pet. App. at A-64; Pet. Supp. App. at 3-4.)

(4) Prior to trial, Thomas attended over sixteen speech lessons from two English teachers in an attempt to improve his communication skills prior to trial. The speech lessons were arranged by his attorneys and held in their law offices. Denny's had informed Thomas that he needed to improve his communication skills to assist him in becoming a promotable candidate. Obviously, the jury concluded that Thomas and his attorneys agreed with Denny's, and arranged for Thomas to be tutored prior to trial. (Pet. App. at A-119; Pet. Supp. App. at 5-8.)

Additionally, Thomas' Countersummary of Facts does not accurately summarize the testimony of the managers designated. Specifically, Irene Johnson ("Johnson") testified that had she known Thomas had not completed the PMP it may have made a difference in her opinion that Thomas should be promoted. Masood Kasim ("Kasim") testified that he did not know if Thomas completed the PMP and Al Clements ("Clements") testified that he never saw Thomas function as a unit aid. (Pet. App. at A-61 to A-62; Pet. Supp. App. at 1.)

Accordingly, in light of the above as well as the additional facts set forth in the Summary of Facts section of Denny's Petition for Certiorari, the jury and trial court concluded that

Thomas failed to establish that he was qualified for promotion, and could not establish a *prima facie* case.

REPLY TO ASSERTED REASONS FOR DENYING DENNY'S PETITION FOR WRIT OF CERTIORARI

I. DENNY'S FIRST "QUESTION PRESENTED FOR REVIEW" WAS RAISED BY THE TENTH CIRCUIT'S OPINION.

As noted by Thomas, Denny's first "question presented for review" by this Court consists of the following:

> Whether, during the *prima facie* stage of a failure to promote case, plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

Thomas erroneously maintains that this issue is not before this Court for review. However, Denny's respectfully submits that the Tenth Circuit overruled the verdict of the jury and trial judge and ruled that the trial court's "qualified applicant" instruction was erroneous. The qualified applicant instruction presented to the jury provided as follows:

> QUALIFIED APPLICANT - DEFINED
>
> To meet his initial burden, the plaintiff must prove that he was qualified for the position for which he applied. To show that he was qualified, plaintiff must show that he possessed the necessary requirements for the position he sought. **You should consider evidence concerning the education, training or experience necessary to perform the job.** The

> plaintiff is not required to prove his qualifications were superior relative to other employees in like positions. **The plaintiff must prove, however, that he was at least as well qualified for the position as the person hired instead of him.**

The trial court instructed the jury that Thomas had to demonstrate at the *prima facie* stage of the case that he at least had the same objective qualifications for the job as the person hired. In fact, the court directed the jury to consider only **education, experience and training** in deciding whether Thomas met this burden.

In the case at bar, Denny's presented evidence at trial that Thomas did not meet the objective or subjective qualifications for the job. However, in its Opinion, the Tenth Circuit simply focused on Denny's subjective qualifications. However, as noted above, the trial court's instruction specifically directed the jury to only consider education, experience and training in determining whether Thomas had established a *prima facie* case that he was qualified for promotion.

Thomas now argues for the first time that because the objective qualifications of the job were not "posted" this Court should not review the issue noted above. Thomas erroneously relies upon EEOC v. WilTel, Inc., 81 F.3d 1508 (10th Cir. 1996) in arguing that objective qualifications of a job must be "posted" by an employer. However, the WilTel court did not rule that objective job qualifications had to be "posted." Rather, WilTel supports Denny's argument that a plaintiff must demonstrate at the *prima facie* stage of the case that he had the same objective qualifications for the job as the person selected. In WilTel, the court noted that plaintiff could not establish a *prima facie* case that she was qualified for the job because she did not have the minimum "telephone experience" required for the job.

Nevertheless, the issue in this case is whether Thomas demonstrated that he met the objective requirements for the job at the *prima facie* stage of his case. Specifically, whether he completed the PMP, business courses, and other work tasks as requested by Denny's. Thomas conceded that he was instructed to meet these objective job requirements, and the record reflects that other candidates who were promoted met these objective job requirements. (Pet. at 16.) More importantly, Thomas knew he had to complete the PMP in order to be promoted and constantly told members of management that he had completed the PMP when in fact he had not.

By ruling that the court's qualified applicant instruction was erroneous, the Tenth Circuit also ruled that Thomas did not have to demonstrate during the *prima facie* stage of his case that he at least had the same objective qualifications for the job as the person hired. Accordingly, this issue is properly before the court and should be reviewed.

II. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AND MISAPPLIED *KENWORTHY V. CONOCO, INC.*, 979 F.2d 1462 (10th CIR. 1992) WHEN IT CONCLUDED THAT THE TRIAL COURT'S "QUALIFIED APPLICANT" INSTRUCTION WAS ERRONEOUS.

In his Response Brief, Thomas erroneously argues that Denny's maintained at trial that Thomas was not qualified for promotion because he failed to meet subjective job requirements. However, Denny's consistently argued at trial that Thomas did not meet the objective or subjective requirements for promotion. Nevertheless, the trial court's

"qualified applicant" instruction directed the jury only to consider objective requirements during the *prima facie* stage of the case. In fact, the trial court's instruction provided in part as follows:

> **You should consider evidence concerning the education, training or experience necessary to perform the job.**

Clearly, the instruction specifically directed the jury to only consider objective criteria during the *prima facie* stage of Plaintiff's case. The jury and the trial court found that Thomas did not establish a *prima facie* case because he did not meet the objective requirements for promotion. There is absolutely no evidence in this record that the jury considered subjective criteria at the *prima facie* stage of the case as suggested by Thomas.

Thomas again argues that because Denny's did not "post" the objective requirements for promotion, the decision of the jury and the trial court should be reversed. However, Thomas never argued that he did not know the objective and subjective qualifications for promotion. In fact, he consistently maintained that he was qualified for promotion. He obviously knew that completing the PMP was necessary for promotion because he consistently told members of management that he had completed the PMP when he knew he had not. Moreover, those employees promoted instead of Thomas, completed the PMP and college courses as requested by Denny's. (Pet. at 16.)

Next, Thomas argues that because the trial court did *not* instruct the jury to consider factors other than "education, training and experience" that the jury *could* have considered subjective job requirements at the *prima facie* stage of the case, and therefore, the ruling of the Tenth Circuit should be

affirmed. Denny's respectfully submits that this argument is frivolous and suggests that trial courts be required to submit "laundry lists" to juries of items they should *not* consider at the *prima facie* stage of a failure to promote case. Denny's submits that such requirement is not practical or logical.

Finally, Thomas attempts to argue for the first time ever that Denny's did not inform him of the objective qualifications for promotion into management. There is absolutely no evidence in the record to support such an assertion. In fact, Thomas conceded that he was told to complete the PMP, take business courses and perform other work related tasks for promotion. (Pet. at 16.) As noted on Page 4 of his Response Brief, Thomas testified that, with one exception, he was better qualified than all the non-African-Americans who were promoted. Thomas definitely knew that he needed to complete the PMP for promotion and consistently misrepresented to members of management that he had completed the PMP, which was why they recommended him for promotion.

III. THE TENTH CIRCUIT OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS REGARDING WHEN A MIXED MOTIVE INSTRUCTION MAY BE GIVEN.

In the case at bar, the sole defense relied upon by Denny's was that Thomas was not qualified for promotion into management. Nevertheless, the Tenth Circuit relied upon the following comments allegedly made by District Leaders in reaching its decision that a mixed motive instruction should have been given:

(a) "You know Thomas has a suit against us."

(b) "We have a problem with Ronnie Thomas and his suit against Denny's."

(c) "They will never allow Ronnie to become manager."

(d) "Would you promote someone who has sued?"

The district leaders denied making these comments. Nevertheless, Denny's respectfully submits that the cases cited in Thomas' Response Brief do not support the Tenth Circuit's decision that a mixed motive instruction should have been given in this case. Specifically, in Heim v. State of Utah, 8 F.3d 1541, 1546 (10th Cir. 1993) the court relied on the Supreme Court's ruling in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and ruled that,

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision.

Heim, 8 F.3d at 1547, quoting Price Waterhouse, 490 U.S. at 251.

In Heim, the court ruled that the remark-- "Fucking women, I hate having fucking women in the office" was not direct evidence of discriminatory intent. Heim, 8 F.3d at 1546.

Denny's respectfully submits that there is no evidence that Denny's actually relied on the fact that Thomas had filed a

lawsuit against the company for race discrimination in making its employment decision not to promote Thomas. Denny's demonstrated that Thomas could not even establish a *prima facie* case that he was objectively qualified for promotion. Moreover, there was no evidence that the alleged remarks were made in connection with an employment decision.

Also, in Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990), cert. denied, 506 U.S. 907, 113 S. Ct. 302, 121 L. Ed. 2d 225 (1992), a woman was hired then filed a discrimination suit claiming that she was treated differently because of her gender. Like Thomas, the plaintiff in Ramsey brought a retaliation claim against her employer. The Director of the Traffic Division testified regarding his feeling about women being better suited to some jobs than to others. The court held that the evidence presented was not "direct" but was "indirect or circumstantial." The court also ruled that such statements constituted the individual's personal opinion. Similarly, in the case at bar, although the district leaders denied making the alleged remarks, the statements constitute personal opinion and not direct evidence of discrimination. The alleged remarks were insufficient to warrant a "mixed motive" instruction.

In Brown v. East Mississippi Electric Power Ass'n., 989 F.2d 858 (5th Cir. 1993), the court held that a mixed motive instruction was proper because there was direct evidence of discriminatory animus by the repeated use of racial slurs when referring to the plaintiff. The remarks included: "What do you want, nigger;" "I felt like getting my gun and killing that nigger;" and "You should have hooked that power up for that nigger. You know how they are." Id. at 861. Denny's respectfully submits that in the case at bar, the alleged statements did not constitute direct evidence of discriminatory animus and the trial court correctly ruled that a mixed motive

instruction was not proper. Finally, in Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992) the plaintiff sued his employer under the New York Human Rights Law alleging age discrimination. The court relied on federal law in reaching its decision. The court ruled that "direct evidence" means evidence that "shows that the impermissible criterion played some part in the decision making process." Id. at 1183. As noted above, Denny's respectfully submits that there was absolutely no evidence whatsoever that the alleged remarks were factors in Denny's decision making process.

In the case at bar, the trial court was able to view the witnesses, their demeanor and all the evidence presented, and properly ruled that the alleged remarks did not warrant a mixed motive instruction.

CONCLUSION

For the reasons asserted above, as well as in its Petition for Writ of Certiorari, Denny's respectfully requests that this Court grant its Petition for Writ of Certiorari in order to give guidance to the courts below.

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with menus and the All-American menu program -- the comments about Mr. Thomas and the seminars or menu programs was as a cook?

A. "That's correct.

Q. "Did you ever see Mr. Thomas perform as a manager at all within the Denny's organization?

A. "No, I didn't.

Q. "Did you ever see him function as a unit aide?

A. "No, I didn't.

Q. "It's my understanding that most people who worked with Ronnie Thomas like Ronnie Thomas?

A. "Everybody likes Ronnie.

Q. "Do you know of any person within the Denny's organization who at any time made a derogatory or negative comment about Ronnie Thomas based on his race?

A. "No, I never heard any comments like that.

Q. "That's all I have."

MR. STIDHAM: Your Honor, this is redirect by Mr. Gaskill.

REDIRECT EXAMINATION BY MR. GASKILL

READ BY MR. STIDHAM:

Q. "It's true, is it not, that you didn't work at the Sheridan and Admiral store with Mr. Thomas every day?

A. "That's true.

Q. "Were there days when you did work with Mr. Thomas?

A. Right.

Q. So if Mr. Rapier sat down with Mr. Thomas and gave him a unit promotable program, that would not be something you would know; isn't that correct?

A. Right.

Q. And if Mr. Thomas did not do any work on that unit promotable program, that's something you would not know; isn't that correct?

A. Right.

Q. Now, did you ever discuss with Mr. Rapier giving Mr. Thomas projects and a unit promotable packet in 1989?

A. No.

Q. When you met with Mr. Rapier and you said you went to talk to him about Mr. Thomas, did you learn that he had been talking to Mr. Thomas privately?

A. Repeat the question?

Q. Yes. Did you ever learn -- excuse me. Did you learn when you were going to Mr. Rapier about Mr. Thomas that Mr. Rapier had been talking to him privately, and by privately, I mean without anybody present?

A. Which instance -- I mean I can't understand what you're asking.

Q. You said to this jury, I went to Mr. Rapier and Mr. Thomas; did you not say that?

A. Are you talking about for a promotion?

itself.

Q. It was paid for by your lawyers, was it not?

A. Yes, that is correct.

Q. It was arranged by your lawyers, was it not?

A. Arranged, yes, that is correct.

Q. It was conducted in your lawyers' office, was it not?

A. Lawyers' office, I had -- most of the time, yes, that is true.

Q. How many meetings did you have with Ms. Strakoulas in your lawyers' office paid by them?

A. A number of meetings. I can't give you an exact amount, sir.

Q. You were there 16 times with Ms. Strakoulas, were you not?

A. That would be correct then.

Q. And more times with Ms. Efird, were you not, Ms. Pat Efird?

A. Pat Efird?

Q. Yes.

A. No, I saw Ms. Efird a short period of time.

Q. Was Ms. Efird a person hired by your lawyers to teach you grammar?

A. To teach me grammar?

Q. Yes.

A. To enhance my grammar?

Q. Yes.

A. Yes, my lawyers did hire her.

Q. Your lawyers paid for her.

A. Yes, yes, that's correct.

Q. You've never paid a dime for that, have you, sir?

A. Oh, no, sir.

Q. But there was an event coming up at the time that you were working toward, was it not?

A. I was always working towards bettering myself.

Q. Was there not a trial set in this case right at the time you were taking these grammar lessons paid for by your lawyers?

A. A trial set, a trial date?

Q. Trial date set.

A. You can't exactly go by trial dates.

Q. Was there not a trial date set that you were working toward when you were taking these grammar lessons?

A. On, yeah, I guess so, I'm sorry.

Q. And wasn't one time it was interrupted where you stopped taking the grammar lessons because the trial was postponed?

A. It was interrupted because you said you had a operation or something like that.

Q. But you postponed the grammar lessons while I was off having an operation; is that your testimony?

A. I have no idea. Wait a minute, I'm sorry, sir. I didn't